

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period
January 1, 1950
Through March 31, 1950
Volume 58

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1950, through March 31, 1950.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**

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OPINIONS

January 6, 1950.

Hon. F. S. Keeler, President,
Board of School Commissioners of
Mobile County,
Mobile, Alabama.

Refunds—School Taxes

Mobile County School Board is authorized, under Title 51, Sections 332 and 333, Code of Alabama 1940, to refund Mobile County School taxes where such taxes have been paid voluntarily, but through error and mistake when they were not lawfully due to be paid.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Reference is made to your letter of November 28, 1949, which again refers to your letter bearing the date of December 29, 1948, and in which you requested an official opinion as follows:

"Following receipt of your esteemed favor of September 15th last, the Woman's Club House Association was appraised of its contents.

"Now the Board of School Commissioners of Mobile County is advised by H. M. Touart, Esq., Tax Assessor of Mobile County.

"that the Woman's Club House Association made proper claims for exemptions at the time they returned their 1946 and 1947 assessments, respectively.

"Renewal is made by these ladies of their application for refund on the thought that it appears that they come within the purview of your Opinion.

"They do come within the purview of your Opinion. Because of the conclusion reached in that opinion and the lack of knowledge that such claims of exemptions had been made, you did not answer the second phase of my inquiry in response to which you wrote your good letter of September 15th. Now it appears that claims of exemptions were made, it becomes necessary to determine the proper answer to the other phase of my inquiry. There seems to be no doubt, on the facts, that the ladies are entitled to refunds from the State and from the County. The question is, are the statutes so written as to authorize a refund by our School Board? Unless they are, I am advised that the ladies are in the position of persons who have paid money voluntarily under a mistake of law and who may not recover it back. This thought has been pointed out repeatedly

by your Office (for example, your Opinions in poll-tax refund matters).

"The pertinent statutes are presently set out in Sections 323 to 328, inclusive, of Title 51, Code of Alabama 1940. While the language of Section 328 is not entirely clear to that end, it apparently contemplates the refund only of taxes paid to the State—otherwise, there would be no occasion to require the taxpayer to make 'proof to the satisfaction of the comptroller'.

"Section 329 deals with the petition generally and is not helpful in the solution of the problem. Section 330 deals with the taxes refundable by the State only. Section 331 deals with taxes paid to the County and provides for refund by the County Treasurer.

"The taxes paid in this County into the hands of the tax assessor, comprehend moneys paid as for State taxes, moneys paid as for County taxes, and moneys paid as for School taxes. The money paid as State taxes, is remitted by the Tax Assessor to the appropriate State officers in Montgomery; the money paid as County taxes is remitted to the County Treasurer; and the money paid as School taxes is paid over by the Tax Collector to the Treasurer of the Board of School Commissioners of Mobile County. The Board of School Commissioners of Mobile County is a public body corporate as distinct from the County of Mobile as the County is from the City of Mobile. The County Treasurer never has in his hands any of the School tax money. So it seems clear that Section 331 does not apply. If this be so, there is no provision of law authorizing the School Board to refund tax money, unless it be contained in the language of Section 333. As here pertinent, that Section reads:

'In case of any petition or application for the refund of any money paid as aforesaid filed with any mayor and alderman or any other municipality or other Board, Circuit Court, or other authority having control or the administration or the supervision of the receipts or disbursements of any taxes collected under, or under color of, any law mentioned in the preceding section, it shall, upon proper proof' make refund of the erroneous payment.

"The 'preceding section' (Sec. 332 of Title 51) is quite broad in its terms, and specifically includes schools; but apparently is intended to apply to taxes levied by municipalities for the purposes in the Section mentioned. Apparently, (but not clearly) the action contemplated by that Section, and the petition contemplated by Section 333, apply to the cities or other political subdivisions of the State levying and collecting the tax.

"Under these circumstances, can the Board of School Commissioners of Mobile County lawfully refund to these ladies the taxes paid by mistake now sought to be recovered back?"

In answering your inquiry it is noted from your letter that the ad valorem taxes involved were paid to the County Tax Collector and by him paid directly to the Treasurer of the Mobile County School Board, and deposited in the Mobile County School Fund and were never a part of the general county funds. That the County School Board is a public corporation, separate in the administration of its affairs from the State and County; it is, nonetheless, a public body and, as such, an instrumentality and political subdivision of the State.

I have carefully read and considered the statutes to which you refer, namely, Sections 323 through 334, inclusive, of Title 51, Code of Alabama 1940. I agree with you in the construction of these statutes until you reach the point of Section 332. I cannot agree with you that this statute, as well as the subsequent one, Section 333, contemplates only the refund of municipal taxes.

While we are fully aware of the fact that the statutes relating to refunds are strictly construed by the courts, and it has been held in this State as well as generally that tax refunds can be made only by express statutory authority, it would appear that Sections 332 and 333 are broad enough in their wording to cover the refund of school taxes, whether such taxes are levied by the counties or municipalities.

Section 332 provides in applicable part as follows:

"In case of the payment of money under mistake of law or fact upon any illegal tax assessment made under color of any law, special or general, of the state, or by any of its political subdivisions, authorizing the assessment or collection of taxes for any purpose whatever, whether for any municipality, for the payment of the creditors of any municipality, for schools, or otherwise, except the laws relating to taxes to be paid to the state or to the general funds of the counties, respectively, the same shall be recoverable by appropriate proceedings at law or in equity against the proper parties or their successors, with the usual rights of appeal, and that such payment was not made under compulsion or protest shall be immaterial." (Emphasis ours.) Section 333 also in pertinent part is as follows:

"In case of any petition or application for the refund of any money paid as aforesaid filed with any mayor and alderman or any other municipal or other board, circuit court, or other authority having the control or the administration or the supervision of the receipts or disbursement of any taxes collected under, or under color of, any law mentioned in the preceding section, it shall, upon proper proof pay or order paid all such money so erroneously paid, and the tax collector, custodian, disbursing officer, or agency under it must obey such order, and also pay such costs as may in such petition or application or suit be awarded, adjudged, or decreed in favor of such person making such erroneous payment; but this section shall not apply to assessments where owners of property received special benefits or where taxes were due but irregularly assessed thereon." (Emphasis ours.)

The above-quoted sections are a carry-over of Sections 3144 and 3145 of the 1923 Code and are substantially the same. While Sections 3144 and 3145 were amended by the enactment of the 1935 General Revenue Act (General Acts of Alabama 1935, pages 256, 379), no substantial changes were made.

In answering a similar question in an opinion to Hon. S. S. Murphree, Superintendent of Education, Mobile County, this office ruled that under Section 3145 of the 1923 Code school taxes could be refunded when the assessment had been made without authority of law and money was erroneously paid on such assessment. It was also prescribed that such refund be made in the following manner:

"In all cases asking for refund of money erroneously collected and paid over for special school taxes, application should be made to the board which has control of the disbursement of such money and the money should be refunded by the officer having such moneys in hand upon the order of the board."

See Biennial Report of the Attorney General, October 1, 1924, through September 30, 1926, pp. 89, 90.

This office has also ruled on other occasions that where county school taxes were voluntarily paid but illegally collected and paid into school funds that such taxes under certain circumstances may be refunded under Sections 3144 and 3145 of the 1923 Code. See Biennial Report of Attorney General October 1, 1928, through September 30, 1930.

It, therefore, follows that under the circumstances of this case, that the Mobile County School Board is authorized to make a refund as to school taxes paid by the Woman's Club Association.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Mrs. Pauline K. Barnes,
Register, Circuit Court,
Dallas County,
Selma, Alabama.

Registers—Dallas County—Absentee Ballots.

1. The register of the circuit court of Dallas County is not entitled to receive additional compensation for services performed under the provisions of Act No. 424, General Acts 1949, page 601, for the reason that Amendment XLVI of the Constitution of 1901 limits the compensation of said register to a specific salary.

2. The sum of \$10.00 per day payable to the register of the circuit court for services performed under Act No. 424, General Acts 1949 page 601, is a fee, commission, allowance, or other compensation within the meaning of Amendment XLVI of the Constitution of 1901.

Opinion by Assistant Attorney General Sykes.

Dear Mrs. Barnes:

Your request for an official opinion bearing date of December 17, 1949 is as follows:

"Will you please give me an opinion as to whether or not I, as Register of the Circuit Court of Dallas County, Alabama, will be entitled to receive such compensation as provided for in Act 424, General Acts of 1949, in view of the fact that the salaries of certain County Officers of Dallas County were fixed by an Act (page 896, General Acts, Regular Session and Special Session, 1939), at certain sums; and among other things, it says:

"The above named officers are hereby required to collect all charges of Court, fees, commissions, allowances, percentages, salaries or other compensation provided by law, other than the salaries herein fixed, and to cover the same into the County Treasury,' etc."

The compensation of the register in chancery of the circuit court of Dallas County is fixed by the Constitution of Alabama. Constitution of Alabama 1901, Amendment XLVI, ratified November 15, 1940. The compensation to which the register in chancery of the circuit court of Dallas County is entitled is a salary in the amount of \$1200.00 per year, and if the same person holds the office of clerk and register in chancery, the compensation is fixed at \$3,000.00. The constitutional amendment, supra, provides in part as follows:

"The above named officers are hereby required to collect all charges of court, fees, commissions, allowances, percentages, salaries or other compensation provided by law, other than the salaries herein fixed, and to cover the same into the county treasury."

In my opinion, the additional compensation provided for in Section 17 of Act No. 424, General Acts 1949, page 601, approved August 19, 1949, is a fee, commission, allowance, or other compensation provided by law. The constitutional provision above quoted clearly indicates that the register would receive compensation in one form only, and that is the salary specified in the amendment. All other compensation received by the register must, by reason of the constitutional provision, be paid into the county treasury. The register of the circuit court of Dallas County, therefore, is not entitled to receive the allowance or fee or compensation of \$10.00 per day as provided for in Section 17, supra, and if the register

does receive said sum of \$10.00 per day, then such funds must be returned to the county treasury.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Hon. Bankhead Bates, Director,
Department of Public Safety,
CAPITOL.

Lee County—Justice of the Peace—Rules of the Road—Inferior Courts.

1. The Court of Common Pleas of Lee County has exclusive jurisdiction over cases involving violations of the Rules of the Road and over misdemeanors defined in Title 36, Code of Alabama 1940.

2. Justices of the peace in Lee County do not have jurisdiction to try cases involving violations of the Rules of the Road.

3. All warrants charging a violation of the Rules of the Road, or charging a misdemeanor defined in Title 36, Code of Alabama 1940, must be returned to the Court of Common Pleas of Lee County, Alabama.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 21, 1949, is as follows:

"Please refer to Act No. 242 of the 1949 Legislature which was approved by the Governor, July 15, and which became effective August 1, 1949. I particularly refer to Section 8, Sub-section B which states 'All warrants issued in Lee County for misdemeanors for violation of the rules of the road and other misdemeanors defined or provided for in Code of Alabama 1940, Title 36, shall be returnable to the Court of the Common Pleas and shall be there tried . . .' Please advise me whether this Court of Common Pleas has exclusive jurisdiction over violations of the rules of the road in Lee County or whether or not the Justices of the Peace in this County still have jurisdiction over these violations.

"It is earnestly requested that you give this matter your attention as promptly as convenient as the patrolmen in this area are in need of your opinion as soon as possible."

In my opinion, the Court of Common Pleas of Lee County, Alabama, created by Act No. 244, General Acts 1949, page 361, approved July 15, 1949, has exclusive jurisdiction over violations of the Rules of the Road which violations are misdemeanors, and justices of the peace in said county have no jurisdiction to try said cases. Act No. 242, supra, creates an inferior court for Lee County, Alabama, which is known as "The Court of Common Pleas of Lee County, Alabama." The act creating the court, supra, defines the jurisdiction of the court and the procedure therein. Section 8(b) of said Act No. 242, provides as follows:

"All warrants issued in Lee County for misdemeanors for violation of the rules of the road and other misdemeanors defined or provided for in Code of Alabama 1940, Title 36, shall be returnable to the Court of Common Pleas and shall be there tried. Except as to the trial tax herein provided, the court costs in such cases shall be the same as in the courts of justices of the peace."

It is clear that every warrant which is issued in Lee County which charges violations of the Rules of the Road, or which charges any misdemeanor defined or provided for the Title 36, Code of Alabama 1940, must be returnable to the newly created Court of Common Pleas of Lee County, Alabama. The terms of this statute are clear and unambiguous, leaving no room for construction.

Since the Court of Common Pleas is granted exclusive jurisdiction over this type of cases, jurisdiction of justices of the peace over such cases in Lee County has terminated. If a justice of the peace issues a warrant charging a violation of the Rules of the Road, or charging the commission of any misdemeanor defined in Title 36, Code of Alabama 1940, then that case cannot be tried in a justice of the peace court in Lee County, but must be tried in the inferior court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Hon. E. J. Gonzales, Member
Board of Registrars,
Mobile County,
Mobile, Alabama.

Board of Registrars.

If a member of the Board of Registrars is unable to serve, the board of appointment shall appoint another member in his place.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of August 26, 1949, is as follows:

"One of the present members of the Mobile County Board of Registrars, Mr. J. M. Schnell, has been confined to the U. S. Veterans Hospital at Biloxi, Miss., since June 5th, 1949 (better than three months) with a serious heart attack and due to this illness he has not been able to serve in his official capacity on this board. According to the latest report, there is no telling when he will be able to return to active service.

"At present this board meets the first and third Monday of each month for the purpose of registering the citizens to vote, except during the regular registration period from Oct. 1 thru Feb. 1 of each year, when we are in session every day.

"From Feb. 7th, 1949 thru May 16th, 1949, or a matter of EIGHT special registration sessions, during which Mr. J. M. Schnell **WERE** present, the board registered 414 additional voters.

"From June 6th, 1949 through Aug. 15, 1949, or a matter of SIX special registration sessions, during which Mr. J. M. Schnell **WERE NOT** present, the board which during this period consist of Mrs. D. C. Randle and myself, registered 911 additional voters to the Mobile County Voting list.

"I realize that with the coming City Election Sept. 12, 1949, more people are applying for registration. However, with the Democratic Primaries next May 1950, I feel that the present heavy registration will continue throughout the regular session beginning Oct. 1 thru Feb. 1, and with this fact in view, it seems to me that the Appointing Board of the Board of Registrars, which consist of the Hon-Governor, State Auditor and the Commissioner of Agriculture, should show some human feeling, not only for Mrs. Randle and myself but for the citizens in this county as well, who are registering in greater numbers now than ever before.

"I feel that the Appointing Authority should appoint a temporary member in Mr. Schnell's absence until he is able to return to the Board or appoint a permanent member so that this board may function as it should and be able to render a service to the people that they are entitled to receive.

"With only two members present and with such a heavy registration in view, the citizens now have to stand in line approximate ONE HOUR OR MORE and then after entering the board's office,

they have to remain there 30 minutes or more going through UN-NECESSARY 'RED-TAPE' in order to register to vote in this county.

"Your Honor, according to the Code of Alabama 1940, Title 17, Sec. 23, VACANCIES OF REGISTRARS: HOW FILLED., I would appreciate your official opinion as to whether this SEAT or POSITION, now held by Mr. Schnell, can be legally declared VACANT, due to the fact, the above law specifically points out that if a member is UNABLE TO SERVE, the appointing board of a majority thereof, shall fill such vacancies."

Members of the Board of Registrars are "* * * * * appointed by the Governor, Auditor and Commissioner of Agriculture and Industries, or by a majority of them acting as a Board of Appointment, * * * * *" (Title 17, Section 21, Code of Alabama 1940) for a term of four years but they "* * * * * may be removed at the will of the appointing board, or by a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; * * * * *" (Title 17, Section 22, Code of Alabama 1940; Biennial Report of Attorney General, 1930-32, page 514).

Title 17, Section 23, Code of Alabama 1940, is as follows:

"If one or more of the persons appointed on such board of registration shall refuse, neglect, or be unable to qualify or serve, or if a vacancy or vacancies occur in the membership of the board of registrars from any cause, the governor, auditor and commissioner of agriculture and industries, or a majority of them acting as a board of appointment, shall make other appointments to fill such board."

You will note that this section makes it the duty of the appointing authority to make other appointments whenever a member is unable to serve. The words of the statute are "shall make other appointments."

Therefore, if a member is unable to serve, the board of appointment "shall make other appointments to fill such board."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Honorable Arthur L. Shaw,
Attorney,
Alabama State Milk Control Board,
Tuscumbia, Alabama.

Alabama Milk Control Board—Appropriations—Legislature.

1. The Legislature is supreme in matters relating to appropriations in the absence of constitutional inhibitions; and the

power to reappropriate, or to limit appropriations, is as broad as it is to appropriate originally.

2. The amount of expenditure authorized to be made by the Alabama Milk Control Board is limited to \$48,000 per fiscal year by Act No. 552, General Acts 1949, page 781, known as the General Appropriation Act of 1949, former specific provisions relating to the Alabama Milk Control Board Fund to the contrary notwithstanding.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of December 23, 1949, is as follows:

"The last session of the Legislature appropriated for the use of the Alabama State Milk Control Board the sum of \$48,000 for each of the fiscal years, 1949-50 and 1950-51.

"Section 5 Alabama General Laws (Regular Session 1939) reads as follows in part.

" 'At any time after the board shall have designated a marketing area as a milk shed, a majority of the producers, producer-distributors and distributors, all groups counted as one group, selling or marketing milk in such milk shed, who operate under a permit from the State Board of Health or any County Board of Health of the State of Alabama, may petition the board by written petition signed by a majority of such producers, producer-distributors and distributors all counted as one group, for the benefits and provisions of this Act etc.'

"The Board at the present time is spending at the approximate rate of \$4,000 per month, this being the amount allotted to it by the Legislature in connection with the establishment and control of the milk sheds already designated by it.

"The Board now has a petition from a group in Southeast Alabama who have petitioned the Board for the benefits and provisions of this Act, and to set up a new milk shed in that area. It is also anticipating a petition likewise from the Counties of Shelby, Madison, and Marshall Counties.

"Section 17 of this Act specifically provides for the disposition of license fees and fines; provides for a 'Milk Control Board Fund' to be used only for the purpose of administration of the Act.

"As Attorney for the Alabama State Milk Control Board we would like to have your opinion upon the following questions:

"1. In view of the provisions of this Act did the Legislature have the authority to limit the spending of the Board to \$48,000.

"2. In the event the Board decides to designate new or additional milk sheds, or change the area of any designated milk shed or combine any two or more designated milk sheds can the fees and fines collected by the board in such milk sheds be legally expended in addition to the \$48,000 appropriated by the Legislature for the use of the Board as set out above?

"3. The Board had on hand at the beginning of the fiscal year, approximately \$15,700, and its anticipated collections for this fiscal year, 1949-50 are about \$48,000, making a total of \$64,000 which will be available to the board this year.

"In your opinion can the board expend any or all of this surplus over and above the \$48,000 limit set by the Legislature in connection with the administration of this Act?"

I am of the opinion that your first inquiry should be answered in the affirmative.

The power of the Legislature is supreme in matters relating to appropriations in the absence of constitutional inhibitions. Not only is the Legislature supreme in matters relating to appropriations, but it has the same powers to reappropriate funds of the State. The power of the Legislature to reappropriate, or to limit appropriations, is as broad as it is to appropriate originally.—See Quarterly Report of Attorney General, Volume 54, page 79, and authorities cited therein.

Applying the above rule to the instant case, it follows that the Legislature had authority to limit the appropriations to the Alabama Milk Control Board. There being no constitutional inhibitions involved, the appropriations as originally made could legally be charged or limited by the Legislature.

I am of the opinion that your second and third inquiries should both be answered in the negative.

Act No. 552, General Acts of Alabama 1949, page 781, known as the General Appropriation Act of 1949, appropriates annually to the Alabama Milk Control Board the sum of \$48,000 for the two fiscal years ending respectively September 30, 1950, and September 30, 1951. This specific appropriation (page 798) reads as follows:

"XXI. ALABAMA MILK CONTROL BOARD:

"For salaries and other expenses.....	\$48,000.00
"Total	\$48,000.00

"The appropriation herein made shall be paid out of the funds in the Alabama Milk Control Board Fund, and all the expenditures under this appropriation shall conform to Article 3, Chapter 4 of Title

55 of the Code of Alabama 1940 and shall be limited in expenditure to the amounts hereinabove set out."

Section 3 of said Act (page 803) provides as following:

"Section 3. That, except as may be herein otherwise provided, the amounts herein specifically appropriated shall be in lieu of the amounts heretofore provided or appropriated by law for such purposes. That the amounts herein appropriated shall be considered as the maximum amounts to be expended for the purposes herein designated and that in no event shall the maximum expenditure provided for in any items of expense exceed the amount allocated herein except for those appropriations designated as 'estimated' and any fees, receipts, income, or moneys collected or received by any department, board, bureau, commission, office or institution as a result of the sale or disposition of any personal property in use by any said department, board, bureau, commission, office or institution are not appropriated for additional expenditure."

It will be noted that the appropriation to the Alabama Milk Control Board is specifically limited to \$48,000 per fiscal year. It will also be observed that specific appropriations, except when otherwise provided, shall be in lieu of the amounts heretofore provided or appropriated by law for such purposes, and that the amounts appropriated shall be considered as the maximum appropriations (with exceptions not herein applicable).

The premises considered, it is my opinion that the amount of the expenditure authorized to be made by the Alabama Milk Control Board is limited to \$48,000 per fiscal year by the 1949 Appropriation Act, *supra*, former specific provisions relating to the Alabama Milk Control Board Fund to the contrary notwithstanding.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Hon. Lecil Gray, Judge of Probate,
Walker County,
Jasper, Alabama.

Peddlers License—Penalty.

Where person, firm or corporation carries on activities which are described under Title 51, Section 611(b), Code of Alabama 1940, in addition to its sewing machine business in one or more counties in this state where such person, firm, or corporation has

no established place of business, and also fits within one of the classifications described under definitions "(a)", "(b)", "(c)", or "(d)" of said Code section, then such person, firm or corporation is liable for the "transient vendor" or "peddlers" license under Section 611(b), supra, in each county involved; notwithstanding the fact that said person, firm, or corporation has paid in said county or counties the truck and sewing machine licenses under Title 51, Section 587, Code of Alabama 1940.

Where a license is delinquent, under Title 51, Section 835(c) and (d) collection of the penalty is mandatory before the license can be issued. Failure to collect the penalty under such circumstances, and before the issuance of the license constitutes an unlawful act.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of November 30, 1949, is as follows:

"I would like to withdraw my request dated November 22, 1949 and substitute in lieu thereof this request for an official opinion.

"On the 9 November 1949, I received a letter from the Singer Sewing Machine Company, together with a check in the amount of \$30.50, wherein they applied for a license under Section 611-B of the General Revenue Laws of Alabama.

"In their application for said license they stated that although they understood this license was due October 1, 1949 and delinquent on November 1, 1949, that the entire matter had been held in abeyance pending an official ruling of the Attorney General. They further stated that said opinion was dated 1 November 1949 and they did not feel they should be compelled to pay the penalty for delay in purchasing the license.

"I contacted your office by telephone and was informed that no official opinion had been rendered to them. On the 17 November 1949 I so informed the Singer Sewing Machine Company.

"On the 22 November 1949 Mr. F. W. Ballard, agent for Singer Sewing Machine Company, called me by telephone and stated that they had discovered that the opinion rendered them was an unofficial opinion signed by the Assistant Attorney General assigned to the Revenue Department, and that this opinion was dated November 1, 1949. Mr. Ballard stated it was his understanding that the Revenue Department requested an official opinion from the Attorney General and that the opinion received by them dated 1 November 1949 was considered by them an official opinion.

"I request that you contact the Assistant Attorney General assigned to the Revenue Department and secure from him the original statement of facts upon which he rendered his opinion on the 1 day of November 1949 and incorporate said statement of facts in regard to the Singer Sewing Machine Company as a part of this request.

"Please give me your official opinion on the following:

"1. Is the Singer Sewing Machine Company subject to the license levied under Section 611-B of the General Revenue Laws of Alabama?

"2. If your opinion is in the affirmative, please advise me whether or not they would be subject to the 15% penalty, in view of the facts set out above.

"I understand that many Probate Judges over the State are holding their applications for licenses pending an opinion from you, and since I have held their application since the 9 of November, 1949, I would greatly appreciate your rendering me an early opinion."

The pertinent facts in the case, though somewhat controversial, as stated by Mr. Beatty, attorney for the company, are, as follows:

"Singer Sewing Machine Company maintains and operates 12 stores or shops in separate and distinct localities in the State. In each store is carried a stock of sewing machines, vacuum cleaners, electric irons and notions (sewing supplies, dress accessories, clocks, kitchen aid mixers, etc.). The main selling objectives are, of course, sewing machines which, along with sewing accessories of vacuum cleaners and irons, are sold at the stores with deliveries thereof made to customers' homes. The Company, as a definite sales policy, undertakes to make such delivery because it is important that a sewing machine be correctly set up and made ready for perfect operation, and, in addition, the opportunity may present itself for a demonstration and sale of either or both a vacuum cleaner and electric iron, both of which articles are definite accessories of sewing. A tailor or seamstress could not efficiently operate without each close at hand. Telephone and mail inquiries addressed to the shops regarding sewing machines and accessories frequently result in home demonstrations followed by sales. Satisfied customers refer prospects to Company salesmen who endeavor to consummate sales of sewing machines and/or accessories. Notions (Over the counter) are sold and immediately delivered on the shop premises. However, their may be infrequent deliveries to customers' homes of store purchased articles, such as, larger items of kitchen aid mixers, etc. Since the beginning of the war and continuing indefinitely, no itineraries for person to person, house to house, or place to place canvassing of sewing machines, vacuum cleaners, or irons have or will be in operation."

Additional facts which have been submitted by the Department of Revenue also are to the effect that during the year 1949 the company's

salesmen or agents did carry on their trucks for the purpose of sale to customers in counties where the company does not maintain and established place of business, electric irons, vacuum cleaners, and mix masters such as are described by Mr. Beatty;; and that the Department has good reason to believe that the same salesmen solicited sales for these commodities which they carry in their trucks from place to place, house to house, door to door, and person to person, in certain of the localities in said counties where the company has no established place of business.

No doubt exists as to the counties in which the company has an established place of business, and has purchased the store license. It would not be subject in those counties to the peddlers license or license provided for under Title 51, Section 611(b), Code of Alabama 1940. That statute expressly provides that: "This subsection shall not apply to sales by a licensed merchant in the county in which his store is located." (emphasis ours). Thus, any question concerning such sales in counties where the company has an established place of business and has paid the store license is eliminated from any further consideration in this opinion.

This would leave for consideration, under your first question, only the more specific question of whether or not the Singer Sewing Machine Company, or a person, firm or corporation, carrying on like activities, would be liable for the peddlers license under Section 611(b), *supra*, where it carries on the sales and activities heretofore described, in addition to its sewing machine business, in those counties in this State where it does not have an established place of business.

Title 51, Section 587, Code of Alabama 1940, the section levying the sewing machine and applicable truck license is, as follows:

"Each person selling or delivering sewing machines, either in person or through agents shall pay twenty-five dollars annually to the state for each county in which they sell or deliver sewing machines. And for each wagon and team or motor vehicle used in delivering or displaying the same, an additional license shall be paid to the state of ten dollars. Provided, that a merchant carrying sewing machines as a part of his stock in trade, and whose principal business is not selling sewing machines, shall not be required to pay this license."

Title 51, Section 611, Code of Alabama 1940, in pertinent part, is, as follows:

"(b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of twenty dollars to the state and ten dollars to the county in each county in which

they do business. This sub-section shall not apply to sales by a licensed merchant in the county in which his store is located. * * *

When used in this section, the words 'transient vendor or peddler' shall be held to include any person embraced in any of the following classifications: (a) All persons commonly and generally termed 'peddlers' and falling within the usual and commonly understood definition of 'peddler'; or, (b) all persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee, or other custodian of goods, wares and merchandise, going from person to person, house to house, or place to place, and selling or offering to sell, or consigning or offering to consign, other than to a retail merchant for re-sale, goods, wares and merchandise; or (c) all persons who do not keep a regular place of business, open at all times in regular business hours at the same place, going from person to person, house to house, or place to place, or from town to town, and selling or offering for sale, other than to a retail merchant, goods, wares, and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or, (d) all persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for re-sale, by exhibiting samples, or taking orders and thereafter making delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business. (emphasis ours.)

It is, therefore, clear under the language of Section 611, *supra*, and the definitions contained therein, that the term "transient vendor" or "peddler" shall be held to include any person, firm, or corporation, which might fit any of the four classifications described therein, namely, "(a)", "(b)", "(c)" and "(d)". Thus, the term "transient vendor" or "peddler" is not confined or limited to the generally accepted definition of such as is contained in classification "(a)", but would also include those persons, firms, or corporations, which would come under the classifications described under "(b)", "(c)", and "(d)".

It also follows that if the agents or salesmen of the Singer Sewing Machine Company carry the electric irons, vacuum cleaners or mix masters, or any other articles or commodities not consisting of a sewing machine or any of the parts therefor, and not included in the exceptions contained in Section 611, *supra*, on trucks or other vehicles into counties where it has no established place of business and does not pay a store license, and sell or solicit sales for said commodities in such counties from place to place, house to house, door to door, or person to person, that the company would be liable for the payment of the peddlers license levied under Section 611(b), *supra*. The fact that the company has paid the truck license and sewing machine license under Section 587, *supra*, in any of said counties would not excuse it from also paying the peddlers license, if it carries on these additional activities. There is no restriction in this state which would prohibit the state from levying two or more licenses on a person, firm, or corporation, engaged in more than one business, or from requiring a license for each branch of the business. See

Title 51, Sections 838, 839, Code of Alabama 1940; Biennial Report of Attorney General 1936-38, page 365; Quarterly Report of the Attorney General, Vol. 16, page 227; Biennial Report of the Attorney General 1936-38, pages 326, 668, 690 and 738; **Brown Plumbing Company v. McDowell**, 240 Ala. 485, 200 So. 104.

The following authorities, although not directly in point, would appear to support the conclusion that under the foregoing circumstances, the peddlers license would be due: **State v. Webster**, 29 Ala. App. 407, 197 So. 87; Biennial Report of the Attorney General 1936-38, pages 215, 690 and 700.

Counsel for the Singer Sewing Machine Company has called my attention to the **Carruth** case (**Carruth v. State**, 24 Ala. App. 158, 132 So. 65). The Court of Appeals in that case did not have before it any question as to Section 611, *supra*, but had under consideration the application of Section 7½ of the General Acts of 1927, page 154. That case turned on the point that that statute contained an exception or an exemption which expressly excluded from its operation, "any merchant having a regular place of business in Alabama." Section 611, *supra*, or more particularly Section 611(b), *supra*, has no such proviso or exception. On the other hand its exception is limited to "sales by a licensed merchant in the county in which his store is located."

In answer to your first question, it is, therefore, my opinion that the Singer Sewing Machine Company, or any other person, firm, or corporation, who carries on similar activities, is subject to, in each county which might be involved, the peddlers license under Title 51, Section 611(b), Code of Alabama 1940, if its agents or salesmen carry by truck or other vehicle vacuum cleaners, electric irons, mix masters, or other commodities or merchandise not a sewing machine or a part thereof, or which come within the exceptions contained in Section 611, *supra*, into counties in this state where it has no established place of business and has not paid the store license, and sell or solicit sales for said commodities in said counties from place to place, house to house, door to door, or person to person.

In answer to your second question, I wish to state that Title 51, Section 835(c) and (d), Code of Alabama 1940, makes it mandatory for the probate judge to collect the penalty where a license is delinquent.

These subsections of Section 835, *supra*, are as follows:

"(c) All licenses levied by this title except as otherwise provided shall be due and payable as of October first of each year and shall be delinquent November first thereafter. Where any license issuable by the probate judge or commissioner of licenses shall be delinquent, the same shall be subject to a penalty of fifteen percent of the amount of the license, which penalty must be collected by the probate judge or commissioner of licenses when the license is taken out together with interest at six percent from the date of delinquency.

(d) It shall be unlawful for any probate judge or other officer to fail to collect such penalties when issuing such license."

Under said subsections the judge of probate must collect the penalty where the license is delinquent. He cannot issue a license under the circumstances until the penalty is paid. In fact if he does so, under subsection (c), he commits an unlawful act.

The collection of the penalty where the license is delinquent is thus compulsory and cannot be waived under any circumstances. See *Birmingham Vending Company v. State*, 251 Ala. 584, 38 So. (2d) 876; *Henry v. Drennen Motor Car Company*, 235 Ala. 559, 180 So. 563; *Brunette v. State*, 28 Ala. App. 110, 181 So. 229; Quarterly Report of Attorney General, Vol. 30, p. 41; Quarterly Report of Attorney General, Vol. 15, p. 60; and Biennial Report of Attorney General 1936-38, p. 126.

Your attention is also called to the fact that if the Singer Sewing Machine Company was carrying on activities in your county prior to October 1, 1949, which would make it subject to the peddlers license under Section 611(b), *supra*, and was operating without a license prior to that date, then it was already delinquent, and it had no license to renew on October 1, 1949, and the penalty was already due. See *Burnette v. State*, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Hon. W. P. Tartt,
Register, Circuit Court,
Sumter County,
Livingston, Alabama.

Registers—Costs and Fees.

A register of the circuit court is entitled to receive a commission when he receives, keeps, and pays out rent on land, the subject of litigation in a chancery court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 10, 1949, is as follows:

"I have on my docket a cause that has been in litigation for the past five years and will soon be terminated. During this time I have

been receiving the rents from said land which are in my fiduciary funds. In making distribution of these funds am I allowed the commission on same.

"This is other funds than from land sales."

From the facts stated in your request for an opinion, I conclude that you have been collecting rent from certain lands, which lands are the subject of litigation in the circuit court of Sumter County. You have then paid the rent into your fiduciary funds under the provisions of Chapter 3 of Title 58, Code of Alabama 1940. The litigation over the lands is about to be concluded, and, by decree of the court, you will be required to distribute these funds according to the decree of the court. Your question is whether or not you are allowed a commission for making such distribution.

In my judgment, you would be entitled to the regular commission prescribed by Title 11, Section 27, Code of Alabama 1940, which provides in part as follows:

"Registers are entitled to the following fees for the following services:

"For receiving keeping, and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one percent; on all over one thousand dollars and not over five thousand dollars, three-fourths of one percent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one percent; and all over ten thousand dollars, one-fourth of one percent; . . ."

Your inquiry states no fact which indicates to me that you would not be entitled to the commission.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1950.

Hon. S. H. Sprott,
City Attorney,
City of Tuscaloosa,
Tuscaloosa County,
Tuscaloosa, Alabama.

City of Tuscaloosa—Civil Service Board.

A person who has been appointed to fill the place of a member of the Civil Service Board of the City of Tuscaloosa whose term has expired, and who has qualified, is entitled to serve on such board to the exclusion of his predecessor.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of November 14, 1949, is as follows:

"I have been instructed by the Chairman of the Commission Board to obtain your opinion as to which of two men is entitled to membership on the Civil Service Board of Tuscaloosa. The facts are as follows:

"By Local Act approved August 6, 1947, appearing at page 174, et seq. of the 1947 Local Acts, the Civil Service System governing the appointment, removal, salaries, tenure and official conduct of the employees of the City of Tuscaloosa was adopted. For your information I attach a copy of Section 4 of said Act pertaining to the appointment and tenure of office of members of said Board.

"Member No. 1 of the Board was appointed to membership on the Board in 1947, soon after the passage and approval of the Act (as were other members of the Board). Member No. 1 has continued to serve since he was first appointed and has not died nor resigned. Notwithstanding, the fact that he has not died nor resigned, the Governor on November 10, 1949, appointed a successor to such Member No. 1 and the question is 'Which one of the two men is entitled to the office, the man appointed in 1947 who has not resigned nor died, or the man appointed on November 10, 1949, who has not been confirmed by the Senae, the Senate having not been in session since the date of his alleged appointment?'"

My answer to your inquiry is that the person appointed to succeed member number 1 on the Civil Service Board of the City of Tuscaloosa, whose term of office expired on May 15, 1949 is entitled to serve as a member of such board.

Section 4 of Act No. 249, General Acts 1947, page 174, which said Act creates the Civil Service Board of the City of Tuscaloosa, in no uncertain terms provides that member number 1 of such board shall hold office from the date of his appointment and qualification to May 15, 1949, and until his successor is appointed and has qualified. There is no question that member number 1's term expired as of May 15, 1949. Neither is there any doubt that after May 15, 1949, the date of the expiration of the term of office of member number 1, the Governor had authority to appoint a successor to this office. The fact that the Governor waited until November 10, 1949, to make this appointment is of no moment.

The authorities are uniform in holding that where the term of office of an incumbent has expired, and the appointing authority has appointed his successor, and such successor has qualified, then the successor is en-

titled to serve in the office to the exclusion of the incumbent. *Monash v. Rhodes*, 53 Pac. 236; *Barrett v. Duff* (Kansas), 217 Pac. 918; *McChesney v. Sampson* (Kentucky), 23 S. W. 2d 584.

Section 5 of Act No. 249, supra, provides that a person may qualify as a member of the board by taking an oath that he is eligible for such office and will execute the duties of the same according to his or her best knowledge and ability.

It, therefore, follows that, since the Governor has appointed someone to succeed member number 1 on the board, upon the appointee qualifying as provided in Act No. 249, supra, he will be entitled to serve as a member of the board to the exclusion of his predecessor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1950.

Hon. Bert E. Thomas, Director,
Department of Conservation,
CAPITOL.

Fish—Sale of Fresh Fish.

1. Fresh fish mean fish which have not been salted or subjected to any of the known processes of curing, such as pickling, smoking or drying, and includes fish which have been frozen, either naturally or artificially.

2. Requiring dealer to pay license for handling fresh salt water fish includes, in that category, fish offered for sale in a frozen state.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of November 7, 1949, is as follows:

"Act No. 303, 1945 General Acts, page 498, approved 7 July 1945, provides that every person, firm or corporation engaged in buying or handling fresh salt water fish secured from commercial fishermen, or other wholesale dealers, for the purpose of resale, shall be required to pay a license in the sum of \$25.00. The Act further provides that any person handling fresh salt water fish strictly at retail to the consumer shall be considered a retailer and shall pay a license of \$5.00 per annum.

"This Department has received numerous inquiries regarding the selling of frozen salt water fish. Many markets handle only frozen fish steaks and filets. Was it the intention of the Legislature, in passing the above Act, to include such commodities in the same category as fresh salt water fish?

"I should like very much to have your official opinion on this matter."

It is my opinion that frozen fish and fish steaks should be considered in the same category as fresh fish.

You predicate your question on Act No. 303, 1945 General Acts, page 498, approved 7 July 1945, which provides, in effect, that every person, firm or corporation engaged in the buying or handling fresh salt water fish for the purpose of resale shall be required to pay a license therefor. I am of the opinion that persons or firms handling frozen fish are actually handling fresh fish.

Let me cite you the case of *Cross vs. Seeberger*, 30 Federal Reporter 427. In this case, the plaintiff imported from Winnipeg, Canada into the Port of Chicago a quantity of frozen fish which were assessed by the collector with a duty of fifty (50c) cents per one hundred (100) pounds under clause 280 of the New Tariff Index. Plaintiff claimed that the fish should have been admitted duty free under clause 699 of the New Tariff Index as "fresh fish for immediate consumption."

The court held that the words "fresh fish" undoubtedly mean fish which have not been salted or subject to any of the known processes of curing them, such as pickling, smoking or drying, but that these words "fresh fish" do not exclude fish which have been frozen, either naturally or artificially, as all persons living in cold latitudes known as a matter of common knowledge that meats and fish are kept fresh by freezing, and so long as they are kept frozen, they retain substantially their natural juices and flavors without aid of antiseptics or desiccation, and are in condition for immediate use. The court was of the further opinion in this case that fresh fish, that is, unsalted or uncured fish, imported in bulk, or otherwise than in barrels and half barrels, in a frozen condition to be put on the market and sold for immediate use, are entitled to admission to the ports of this country free of duty.

Ballentine's Law Dictionary defines the word "fresh" as "uncured" and "unsalted."

In the case of *Florida Packing and Ice Company vs. Carney*, 41 So. 190, it was shown that a tax imposed by a Florida Statute is upon the wholesale dealer in "fresh" meats only. The court held that meats technically known as "cured" from having been treated with salt, smoke, etc. keep in an edible condition indefinitely even in the warmest latitudes, whereas the same meats when untreated and fresh, though capable of being kept in their fresh and natural condition for long periods of time

in a low temperature, either natural or artificial, quickly spoil, become putrid and unfit for use when subjected to high or even mean ordinary temperatures. It is upon the wholesale dealer in the last-described commodity that the quoted section of the statute imposes the license tax, and not upon the dealer in cured or salted meats.

Based upon these decisions, it seems to be the weight of authority that frozen fish or meats are considered by the courts as being "fresh", as compared to fish or meats which are salted, cured, dried, smoked or treated with other preservatives, and the courts hold that frozen fish or meats are subject to immediate consumption the same as fresh fish or meats.

It is my opinion that this conclusion is well taken and, therefore, I answer your inquiry that it is the intention of the Act referred to in your letter for every person, firm or corporation engaged in buying or handling fresh salt water fish to pay a license for the handling of such fish, and this license should also be paid on such fish which they handle in the frozen state.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1950.

Hon. Bert E. Thomas,
Director of Conservation,
State of Alabama,
CAPITOL.

Fishing—Trotlines and Snaglines.

The Act which allows the use of a "hook and line" means an ordinary hook and line and does not contemplate use of a trotline or snagline, which is a line with multiple hooks.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion bearing date of November 7, 1949, is as follows:

"Section 77, Title 8 of the 1940 Code of Alabama, in effect, prohibits any person, firm or corporation, engaged in the business of fishing or of catching fish for commercial purposes, who has not been a bona fide resident or citizen of this State for one year past, to catch or take fish, or attempt to catch or take fish, in any of the waters of Alabama, except with hook and line or cast net.

"Our Department has received numerous inquiries regarding this Section, specifically whether or not a trotline and snagline shall be considered, within the exception allowing such non-residents to fish commercially with hook and line. The legislative intent of this Section is not clear enough for us to answer these inquiries directly.

"I should like very much to have your official opinion on this question. Your usual prompt attention in handling such matters will be deeply appreciated."

I am of the opinion that a non-resident of the State of Alabama, under Section 77, Title 8 of the 1940 Code, cannot use trotlines and snaglines within the exception allowing non-residents to fish commercially only with "hook and line" or cast net.

The specifications for a cast net are set by Regulation No. 12, page 37 of Alabama Regulations Relating to Game, Fish, Seafoods and Fur-Bearing Animals, Season 1948-1949, as follows:

"A thread or cord net whose length is not in excess of eight (8) feet and the depth of which is not in excess of four (4) feet."

The Legislature specifically prohibited non-resident commercial fishermen from using large seines or nets which sometimes exceed five hundred (500) feet in length, and confine such non-residents to the use of small eight (8) foot net.

By Act. No. 263, 1945 General Acts, page 407, effective 30 September 1945, the Legislature named certain fishing gear as being commercial fishing gear for use in certain areas of Alabama. Among the fishing gear which the Legislature specifically designated as being commercial gear are listed trotlines and snaglines. The ordinary hook and line is not among those which the Legislature considered at that time as being commercial fishing gear. In like manner, the cast net is not listed as being commercial fishing gear.

The trotline or snagline is known among fishermen as a long line on which are tied a number of hooks, ranging up to several hundred. These lines are used extensively by commercial fishermen throughout the public waters of Alabama, where they are allowed by law. They are not operated by hand, but are tied to two respective points which may vary in distance sometimes exceeding five hundred (500) feet, and to which are attached the multiple hooks.

The ordinary hook and line is considered by fishermen to be a line attached to a cane pole, or one operated by hand, on which one hook is used. This type of fishing gear is used mainly by sports fishermen. A commercial fishermen could not make a large enough catch with an ordinary hook and line to justify its use extensively. Commercial fishermen use those types of fishing gear which are conducive to large and fruitful catches. It follows that inasmuch as the Legislature specifically prohibited

non-resident fishermen from using large nets, but confined their fishing activities to the small cast net, the same intention applies to restricting non-resident commercial fishermen from using other large fishing gear such as trotlines and snaglines, and when the Legislature restricted their use to the hook and line, it was evidently the intention that they meant the ordinary hook and line.

Based on the above reasons, I am of the opinion that the exception to Section 77, Title 8 of the 1940 Code, which allows non-residents to fish with a hook and line or cast net, does not mean that they may fish with a trotline or snagline, but must confine their fishing activities to an ordinary hook and line, which is considered to be a line attached to a cane pole or a hand line to which is attached one hook.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1950.

Mrs. Sarah J. Daye,
Clerk of the Circuit Court,
Madison County,
Huntsville, Alabama.

Newspapers—Judges of Probate—Clerks of Circuit Courts—
Registers.

1. Title 13, Section 283, Code of Alabama 1940, only punishes for failure of the named officers to subscribe for, take, keep, bind and file weekly newspapers published in their respective counties.

2. Said section is not applicable to daily newspapers.

3. The weekly newspapers, if otherwise qualified, need not normally carry legal advertisements or publications.

Opinion by Assistant Attorney General Screws.

Dear Madam:

Your request for an official opinion, bearing date of September 29, 1949, is as follows:

"In Madison County, Alabama, there is but one weekly newspaper and only one daily newspaper now being published that can qualify under Section 713 of Title 7, of the Code of Alabama, 1940, to receive legal advertisements. The one weekly newspaper does not have a very wide circulation, and hence most, if not all, of the legal advertisements

from the offices of the circuit clerk, register and probate judge, are placed with the daily newspaper. The one weekly newspaper has changed ownership several times within recent years, and sometimes, for this reason, the issues are irregular. The Circuit Clerks of Madison County have not for several years back, and I understand this applies to the Registers in Chancery, also, subscribed for, taken or filed, in their respective offices, the weekly issues of the one weekly newspaper so published in Madison County, due to the fact that the said weekly newspaper does not have a very wide circulation. There are no bound copies of any weekly newspapers to be found in the Office of the Circuit Clerk of Madison County, and, owing to the fact that Section 283, Title 13 of the Code of Alabama, 1940, provides for a penalty against such officers who failed to subscribe for, take, file, and cause to be bound and safely kept in his office weekly newspapers, as required, by law, I would appreciate your office advising me as follows:

"1. Should I subscribe for, take, file and cause to be bound weekly newspapers, whether one or more, if published in Madison County, Alabama, regardless of whether such weekly newspaper publishes no legal advertisements, or some legal advertisements, if such newspaper is so qualified under Section 713, Title 7, Code of Alabama, 1940, to receive and publish such advertisements?

"2. If the one daily newspaper should accept legal advertisements and publish same on a certain day each week, say Thursday, and no other day of the week, would such officials as mentioned above, be justified in subscribing for, take, file and have such issues of the daily newspaper carrying such weekly advertisements bound at the expense of the County, and thus avoid the penalty as prescribed in Section 283, Title 13 of the Code?"

I am of the opinion that your first inquiry should be answered in the affirmative, and your second inquiry in the negative.

Title 13, Section 283, Code of Alabama 1940, provides as follows:

"§ 283. Failure to take, keep, and bind newspapers.—Any probate judge, clerk of the circuit court, or register who fails to subscribe for, take, file, cause to be bound, and safely keep in his office weekly newspapers, as required by law, must, on conviction, be fined not less than fifty dollars; and one conviction shall not bar a subsequent conviction for a continuing neglect."

The requirement referred to above is found in Title 7, Section 724, Code of Alabama 1940, as amended by Act. No. 9, General Acts 1945, page 27, which is as follows:

"724. The clerks of the several circuit courts, the registers, and judges of the several courts of probate, must subscribe for and take, and file in their respective offices, one copy of each weekly newspaper

published in their respective counties, and as soon as practicable, after the end of each year, shall cause the number of such papers for the preceding year to be well bound, and shall keep the same safely in their respective offices, as the property of their respective counties; and the court of county commissioners must allow to such officers the sums paid by them for such subscription and binding. The duties hereinabove imposed on clerks of the circuit court and registers shall not apply to clerks of the circuit courts and registers in counties having a population of 400,000 or more according to the last or any future federal census."

This requirement is applicable only to such weekly newspapers as are published in the county of the officers in question, and they must keep all the weekly newspapers published in their respective counties. It does not apply to daily newspapers. An examination of the pertinent provisions of law involved clearly shows that Title 13, Section 283, supra, only undertakes to make a crime out of the failure to subscribe for, take, keep, bind and file the weekly newspapers published in the county of the officer, and none other. The officer is not required to keep any newspaper except weekly newspapers of his county.—Quarterly Report of Attorney General, Volume 22, page 81.

The failure of a weekly newspaper published in the county of the officers under consideration, and otherwise qualified, to normally carry legal advertisements or publications does not affect the above conclusion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1950.

Hon. J. C. Threadgill,
Secretary-Treasurer,
Board of Plumbers Examination and Registration,
CAPITOL.

Plumbers—Fees.

1. Applicants for a waiver of examination for a master or journeyman plumber's certificate are not required to pay the examination fee.

2. An application for a waiver of examination for a certificate as a master or journeyman plumber may be denied by the Board, if the required proof which must accompany the application is not to its satisfaction.

3. An applicant would have no recourse against individual board members, who, acting in their official capacity and in good

faith, denied his application for a waiver of examination for a master or journeyman plumber's certificate.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of December 1, 1949, is as follows:

"Re: Application fees for Master and Journeyman plumbers.
Act No. 529—Regular Session 1949.

"As Secretary-treasurer of the Board of Plumbers Examination & Registration of Alabama, I request your opinion on the following questions:

"1. Should the Board require an application fee from a Master or Journeyman plumber when they are applying for a waiver of examination?

"2. Does the Board have the right to require the applicant to take the examination if he applies for waiver and the Board denies his request for waiver? If the Board can deny request for waiver and require examination, could there be any recourse against the Board member?

"Thanking you very much for an early opinion on these questions."

The answers to your questions require a consideration of Act. No. 529, General Acts 1949, page 827, approved September 2, 1949. Sections 7 and 9 of this Act read, in pertinent part, as follows:

"Section 7. EXAMINATION AND CERTIFICATION:

* * * * *

"It shall be the duty of the Board to examine and pass upon the qualification of every person who may apply for a journeyman plumber's certificate upon forms provided by the Board. * * * * *

"It shall be the duty of said Board to examine and pass upon the qualifications of every person who may apply for a master plumber's certificate upon forms provided by the Board. * * * * * The examination required of an applicant for a permit as a master plumber or journeyman plumber may be waived by the Board as to any person who furnishes satisfactory proof to the Board that he is a person of good moral character, and that he has been actively engaged as a master plumber or as a journeyman plumber, and duly licensed as such under the general laws of the State of Alabama, as the case may be, for at least two years, provided that such person files an application in writing for waiver with the Board, which application shall be ac-

accompanied by an affidavit giving the name or names of persons, firms or corporations, and the addresses thereof, by whom he has been employed, or for whom he has done plumbing work, during said two years of his engaging in said trade. And, provided, further, that said application be filed within six months after the passage of this Act.

* * * * *

"Section 9. EXAMINATION FEE. Any person filing application to be examined as a master plumber, shall pay a fee of \$25.00; and any person filing application to be examined as a journeyman plumber, shall pay a fee of \$15.00. Said fees shall accompany the application and shall not be returnable."

In answer to your question No. 1, it is my opinion that the Legislature intended, when it inserted the exception permitting the Board to waive examination as to those persons who furnish satisfactory proof to the Board of their prior experience, etc., to authorize the Board to excuse established plumbers from taking their respective examinations, provided that an application for waiver of examination is filed within six months of the passage of the Act. Established plumbers, applying under the provisions of the exception, supra, do not file an application to be examined as a master or journeyman plumber. They merely furnish satisfactory proof to the Board of the matters outlined in the Act, supra. I, therefore, conclude, in answer to your question No. 1, that the application fees required by Section 9, supra, should not be collected by the Board from master or journeyman plumbers when they apply for a waiver of examination.

In answer to your question No. 2, it is my opinion that the Board may deny a waiver of the examination to any person who does not furnish satisfactory proof to the Board that he is a person of good moral character, and that he has been actively engaged as a master plumber or as a journeyman plumber and duly licensed as such under the general laws of the State of Alabama, as the case may be, for at least two years. Under the terms of the statute, the proof must be satisfactory to the Board. Its determination, made in good faith, would be final as to what constitutes satisfactory proof. I, therefore, conclude that the Board can deny an applicant's request for waiver of examination and require him to take the regular examination, if satisfactory proof is not submitted. You will note that, according to the words of the statute, "the examination * * * * * may be waived by the board."

An applicant for a waiver of examination would have no recourse against individual board members, who, acting in their official capacity and in good faith, denied his application.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1950.

Hon. Jeff D. Smith,
Circuit Solicitor,
23rd Judicial Circuit,
Madison County,
Huntsville, Alabama.

Absentee Ballots—Board of Registrars—Elections—Judges of Probate—Opinions Overruled, Modified, or Distinguished—Registration—Residence—Voters—Voting Machines.

1. Law relating to voting machines discussed generally.
2. Judge of probate has no authority to transfer elector from one precinct to another within the county.
3. Board of Registrars may require applicant for registration to give full name; however, person may not be required to re-register for such purpose.
4. Principles of law regarding changes of residence from one state to another or from one county to another apply to changes of residence from one precinct to another.
5. Biennial Report of Attorney General, 1934-36, page 702, modified.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1949, is as follows:

"Please forward me your official opinion on the following twelve questions:

"(1) How long must voting machines remain locked against voting and records of the election be preserved after a primary election?

"(2) Who has the authority for holding a primary election in Madison County, and who is responsible for holding the school of instruction as required by Title 17. Section 103, Code of 1940?

"(3) Must officials attend a school of instructions prior to each election, except a second primary, or is the holder of such a certificate not again required to attend a school for voting machine officials?

"(4) If an election official fails to attend the school of instruction held under Title 17, Section 103, Code of 1940, does he disqualify him-

self to serve in the election in which he was appointed to serve? If so, does he violate any law by failing to serve on election day? Does he violate any law by so disqualifying himself? If he disqualifies himself by failing to attend school, is it the responsibility of anyone to prevent his serving on election day? If a person appointed as an official fails to attend the school but serves on election day has he violated any law?

"(5) Is a member of the democratic Executive Committee an elective official in the sense of Title 17, Section 64 (11), code of 1940?

"(6) Can the probate judge be charged with neglect of duty or with violation of any law if a person other than the one voting an absentee ballot receives that absentee ballot from the probate office?

"(7) Can an election official be held responsible and therefore subject to the penalties as provided by Title 17, Section 118, Code of 1940, for failure to perform any of the duties imposed on him in Article 7, Section 91, through 117, Title 17, if no person qualified to advise him on election laws is provided at the school of instructions?

"If not, who is responsible for providing for the giving of instructions on election laws at the school of instructions?

"(8) Does the opinion of the attorney general, Report of Attorney General 1934-36, Page 702, give the probate judge a right to transfer the name of a voter from one precinct to another simply on request of the voter and without prior action by the Board of Registrars? (Title 17, Sections 38 and 44).

"Is the probate judge given such authority by Title 17, Section 355, or elsewhere?

"(9) Can a voter transfer from one voting district to another simply by asking the probate judge to transfer his name?

"(10) Does Title 17, Section 38 prevent the probate judge from making any transfers of names on the qualified lists or additions to the qualified lists except once each year after Feb. 1 by comparing the lists of registered voters with the poll tax lists?

"(11) Does the Board of Registrars have the authority under Title 17, Section 53, or elsewhere to require that new registrants give names in full, rather than using initials? Can this authority be used to require this information at a later date from persons formerly registered?

"(12) Does Title 17, Section 17 apply to residence requirements within a county, that is, must the question of whether or not a voter intended his residence to be changed temporarily or permanently (Report of Attorney General 1934-36, Page 479) determine in which precinct or voting district a person living in the county must vote?

"These questions were requested by a Madison County Grand Jury which investigated corrupt election practices in Madison County. The Grand Jury has now been discharged, but certain organizations are interested in the conduct of our elections and are continuing in their efforts to improve conditions.

"These questions are submitted to you in the same form in which they appeared in the final report of the Grand Jury to the Judge of said County."

I shall consider your questions seriatim.

1. I direct your attention to Title 17, Section 114, Code of Alabama 1940, which reads as follows:

"Preservation of ballots and records of voting machines.—The voting machine shall remain locked against voting for the time as provided by law for the filing of contest, and then shall have the seal broken only on the order of that body which, under the general provisions of law, now have charge of and control over ballot boxes in that county, municipality, or other political subdivision, and if, in the opinion of such body, a contest is likely to develop, shall remain locked for the time as provided by law for the filing of contests. Except that, on the order of any court of competent jurisdiction or on the order of any legislative body or governing body having jurisdiction over such election, the seal may be broken for the purpose of proper investigation and, when such investigation is completed, the machine shall again be sealed and across the envelope containing the keys shall be written the signature of the person or persons having broken same. Irregular and challenged ballots shall be preserved in the same manner and for the same length of time as now provided by law for other ballots."

Title 17, Section 373, Code of Alabama 1940, deals with the contest of elections and provides that contests of primary elections for county officials shall be begun within five days after the result has been announced. Fifteen days is allowed for contests by candidates for other offices.

Reading these two sections together, it is my opinion that voting machines should remain locked against voting for at least five days after the declaration of the result of the primary in cases of county elections, and for fifteen days in all other instances. They then should be opened only by the order of that body which has control of the ballot boxes. Quarterly Report of Attorney General, Volume 51, page 164.

Your attention is also invited to the fact that Title 17, Section 114, *supra*, provides that voting machines may be opened for investigation by order of certain enumerated persons and then locked and sealed again.

2. It is provided in Title 17, Section 103, Code of Alabama 1940, that where voting machines are used, "not less than five days before an elec-

tion or primary election, the authority charged with holding the same shall cause to be held a school of instruction for those who will actually conduct the election or primary election * * *." (Emphasis supplied.)

In an opinion of this office found in Quarterly Report of Attorney General, Volume 51, page 60, it was held that, as applied to primary elections, the judge of probate is the "authority charged with holding the same." Therefore, it is my opinion that the judge of probate has authority to hold a primary election and is responsible for holding the school of instruction required by Section 103, *supra*.

3. It is my opinion that the purpose of the school of instruction as required by Title 17, Section 103, Code of Alabama 1940, is to insure that the election officials are qualified to perform their duties. I see no reason why an official who already has a certificate showing completion of the instruction should be required to attend the school a second time. In Quarterly Report of Attorney General, Volume 51, page 141, it was held that, since the only purpose of such a school of instruction was to insure that the election officials are fully qualified to perform their duties in connection with voting machines, there was no necessity for conducting a school before a second primary, the officers of which had previously received certificates. While the above-mentioned opinion does not specifically answer your question, it is sufficiently similar to be applicable in the instant case.

4. In Title 17, Section 103(b), Code of Alabama 1940, it is provided that no election official shall serve in an election district where voting machines are used unless he has attended a school of instruction. Therefore, if an election official fails to attend the school, it is my opinion that he is not qualified to serve.

Since the official has not qualified himself to serve, he should not serve, and does not violate any law by not serving. Act No. 587, General Acts 1949, page 913, provides punishment for an official who fails to serve on election day. However, it is inconceivable that the Legislature intended to force an uninstructed and unqualified officials to serve on election day by punishing him if he failed to serve. It is my opinion that Act No. 587, *supra*, would apply where the official had first qualified himself by attending a school of instruction and then failed to serve on election day, and not where he failed to attend the school.

In am of the opinion that it is the duty of the election official to qualify himself to serve. By failing to qualify himself, without a lawful excuse, for serving, an official, in my opinion, violates Title 17, Section 314, Code of Alabama 1940, which provides for punishment for failure or refusal to perform the duties prescribed.

Title 17, Section 105, Code of Alabama 1940, sets out the general provisions regarding elections where voting machines are used. Said section states the "inspector shall be in general charge of the poll." It is my opinion that the inspector should ascertain that all officials at his poll have a certificate showing proper instruction.

It is my opinion that a person who serves without having attended a school of instruction violates Title 17, Section 103(b), *supra*, and, hence, may be punished as provided in Title 17, Section 118, Code of Alabama 1940.

5. Title 17, Section 64(11), 1947 Cumulative Pocket Part, Code of Alabama 1940, is an unofficial codification of a portion of Act No. 478, General Acts 1945, page 711, which was repealed by Act No. 424, General Acts 194, page 601. Therefore, your fifth question is now moot.

6. In view of Act No. 424, *supra*, which places the duty of handling absentee ballots upon the register in chancery, your sixth question has likewise become moot.

7. The first part of your seventh inquiry presupposes the holding of a school of instruction by incompetent persons. I am of the opinion that an election official who attends a school and accepts a certificate at its completion cannot assign the incompetence of his instruction as an excuse for subsequent failure to perform his duty. The answer to the first part of this inquiry renders an answer to the second part of the same unnecessary. However, your attention is called to my answer to your second question.

8. In my opinion, the judge of probate has no authority to transfer the name of a voter from one precinct to another without prior action of the board of registrars. Title 17, Section 44, Code of Alabama 1940, provides, in pertinent part, as follows:

“* * * When said board of registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any county said board of registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved.”

See Quarterly Report of Attorney General, Vol. 3, page 197, and Quarterly Report of Attorney General, Vol. 11, page 22. To the end that the judge of probate may have the information in regard to electors transferred from one precinct to another by the board of registrars, it would be good practice for the board to furnish the judge of probate with complete information in regard to such electors from time to time, just as they are required by law to furnish such information to him in regard to newly registered electors. See Title 17, Section 54, Code of Alabama 1940, as amended by Act No. 483, General Acts 1947, page 333.

I find no provision authorizing the judge of probate to make such transfer himself, either in Title 17, Section 355, Code of Alabama 1940, or elsewhere. This office has heretofore held that the judge of probate has no authority to strike names of persons from the lists of registered voters, even when it affirmatively appears that residence requirements have not been complied with. Biennial Reports of Attorney General, 1934-36, page 110.

The opinion found in Biennial Report of Attorney General, 1934-36, page 702, might be construed to permit the judge of probate to transfer a voter's name from one precinct to another, upon application of the voter, and is, therefore, modified to conform to this opinion.

9. The answer to this question is found in my answer to your eighth question.

10. In my opinion, Title 17, Section 38, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331, provides for the making of one list of qualified voters to be published on or before the 15th day of April, 1940, and each two years thereafter. It further provides for a supplementary list containing the names of qualified voters who were inadvertently omitted from the first list to be published on or before the first day of May, 1940, and each two years thereafter. There is no provision for the publication of any additional lists. See Biennial Report of Attorney General, 1930-32, page 1037, and Biennial Report of Attorney General, 1934-36, page 130. This does not prevent the judge of probate from making changes in the list as soon as the proper information is given him by the board of registrars. Therefore, although he may not publish additional lists, he may amend the list at any time upon receipt of the proper information from the board of registrars. See the last sentence of Title 17, Section 27, Code of Alabama 1940, as amended by Act No. 561, General Acts 1943, page 560.

11. Title 17, Section 53, Code of Alabama 1940, provides that the board of registrars may make such rules and regulations as it deems proper for the receipt of applications for registration. I am of the opinion that this section would give the board of registrars authority to require an applicant to give his full name. However, it is my further opinion that to require persons already registered to reregister, giving their full names, would be a violation of Title 17, Section 36, Code of Alabama 1940. Said section provides that no person heretofore registered, and no person hereafter registered, shall again be required to register unless he or she changes the county of his or her residence.

12. The principles of law governing changes of domicile from one state to another or from one county to another apply to changes from one precinct to another as well. See Quarterly Report of Attorney General, Vol. 27, page 48; Quarterly Report of Attorney General, Vo. 52, page 256.

In answering your various questions, I have given consideration to all pertinent statutes passed at the 1949 Regular Session of the Legislature of Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1950.

Hon. James T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Counties.

County governing body not authorized to expend county funds for the erection of cattle gaps and gates on the public roads of the county.

Opinion by Assistant Attorney General Goldthwaite.

Dear Sir:

Your request for an official opinion bearing date of January 5, 1950, is as follows:

"The County Governing Body of Butler County, from time to time, has requests from various citizens who own property adjacent to public roads of the county to build cattle gaps across the roads, with a gate or gates adjacent thereto which livestock may pass. Such cattle gaps and gates, of course, are of no benefit whatsoever to the traveling public and are not necessary for either the improvement or maintenance of such roads. Rather, they are solely for the benefit and convenience of the adjacent property owners.

"Please advise me if such cattle gaps and/or gates may be built and maintained at the expense of the county; or if the expenditure of county funds for such purpose would be illegal."

It is my opinion that the county governing body of Butler County may not use county funds for the building of cattle gaps, and gates adjacent thereto, across the public roads of the county.

Such an expenditure of county funds would be for the benefit of private individuals in clear violation of Section 94 of the Constitution of 1901, which reads as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

It is my considered opinion that the adjacent property owners, for whose sole use and benefit there cattle gaps and gates would be constructed, fall within that part of Section 94, *supra*, prohibiting the grant

of public money "to any individual." See *Stone v. State, ex rel., Mobile Broadcasting Company*, 223 Ala. 426, 136 So. 427, and authorities therein cited.

Under Section 94, *supra*, it has been held that a Chamber of Commerce is an association within the meaning of this section, and that a city or county is without authority to donate public funds to a Chamber of Commerce. Quarterly Report of Attorney General, Vol. 35, pages 7 and 84; Vol. 39, pages 32 and 65. It has also been held that the expenditure of county funds for financial assistance to the parents of newly-born quadruplets is illegal. Quarterly Report of Attorney General, Vol. 18, page 243.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 23, 1950.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Prisons and Prisoners—Insane Persons—Hospitalization.
County can pay for the hospitalization of indigent insane persons under certain conditions.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of June 13, 1949, is as follows:

"The City of Dothan who uses the county jail to incarcerate their prisoners placed a person in jail on a charge of public drunkenness. Two days later the county Health Officer visited the jail and questioned the prisoner and formed an opinion that he was mentally unbalanced. He requested the Probate Judge to hold him for ten days for mental observation. The Probate Judge issued an order to the Sheriff committing the prisoner for ten days for mental observation. During this ten day period of confinement the County Health Officer ordered the prisoner sent to a local hospital for treatment.

"I have been requested by the Board of Revenue to ascertain if it is legal for the County to pay this bill."

From the facts outlined in your inquiry, it is not clear whether or not the prisoner was being held by the county as a law violation or merely

under the provisions of Title 15, Section 432, Code of Alabama 1940, as an insane person or a maniac. Therefore, I shall answer your request with both possibilities in mind.

If the person concerned is held as a county prisoner, he is entitled to medical attention under Title 45, Sections 125 and 129, Code of Alabama 1940, provided the conditions therein imposed exist.

The opinions of this office have limited the field of operation of Section 125, *supra*, to those cases where the prisoner is unable to provide such treatment himself. Quarterly Report of Attorney General, Vol. 21, page 112; Biennial Report of Attorney General, 1930-32, page 3.

In order to place the prisoner in the hospital there must be a finding and order of the circuit judge in compliance with Section 129, *supra*. When there has been a compliance with that section the expenses of hospitalization may be paid under Section 125, *supra*, when the prisoner is insolvent or unable to provide payment himself. Quarterly Report of Attorney General, Vol. 21, page 110.

In Quarterly Report of Attorney General, Vol. 43, page 60, it was said:

"It may be stated in conclusion that our statutes provides for the medical attention and hospitalization of persons who are confined to jail. It matters not whether the prisoner is charged with a felony or a misdemeanor, the expenses are paid by the county. There are certain requirements, however, to be fulfilled before the county may pay such expenses. In the case of mere medical attention where there is no hospitalization, such medical attention may be paid for by the court of county commissioners if the prisoner is insolvent or unable to pay himself. The court of county commissioners may also pay the hospital expense if the prisoner is unable to pay himself, but only when the prisoner has been committed to the hospital on order of a judge."

I, therefore, conclude that the county is authorized to pay for the hospitalization of an indigent insane prisoner when his hospitalization is ordered by the circuit judge in compliance with Section 129, *supra*.

If the person concerned was held under the provisions of Title 15, Section 432, Code of Alabama 1940, as an insane person or maniac, it is my conclusion that such payments may be made under the authority of Title 15, Section 433, Code of Alabama 1940, provided the conditions to that section are met. Section 433 reads as follows:

"§ 433. Compensation to persons caring for insane paupers.—The governing body of each county shall provide a schedule of fees in their respective counties, to be paid out of the county treasury on their order, to the county officers, or any person duly deputed by such officers, to temporarily provide for the care and maintenance of any person alleged to be insane, when such person has no means

of paying such expense, pending an investigation into the mental status of such alleged insane pauper, before the probate judge of such county. Such judge shall, at the same time, hear evidence and decide therefrom the question of the ability of such alleged insane pauper to pay such expenses."

In my opinion, the care and maintenance of the person alleged to be insane would include the necessary medical and hospital treatment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 27, 1950.

Hon. John R. Adkins, Mayor,
City of Dothan,
Houston County,
Dothan, Alabama.

Municipalities—Elections—Absentee Ballots.

Act No. 424, General Acts 1949, page 601.

1. It is mandatory that absentee voting be provided for in municipal elections, under the system and procedure provided for within Act No. 424, General Acts 1949, page 601.

2. If any municipal election is held at a time different from a primary or general election, the duties with reference to the handling of absentee ballots which are required by Act No. 424, General Acts 1949, page 601, to be performed by the register, shall be performed by the city or town clerk or other officer performing the duties of the clerk.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 16, 1950, is as follows:

"The City Democratic Executive Committee, of Dothan, Alabama, has called a City Democratic primary election for February 21, 1950, for the purpose of electing a Democratic candidate for the position of City Commissioner for three years. The regular municipal election for such office will be held in September, 1950, as provided by law. So far as I know, no other primary, general or special election will be held in Houston County on that date, i.e., February 21, 1950.

"As provided by law, the undersigned, as Mayor of the City of Dothan, Alabama, hereby requests your written opinion on the following questions:

"(1) Is it mandatory that absentee voting be provided for in said election?

"(2) Under Act No. 424 approved August 19, 1949, should the absentee ballots be handled by the City Clerk, or other official performing the duties of Clerk, or by the Register in Chancery?

"I shall appreciate a reply as soon as possible."

In giving answer to your inquiries, consideration must be had of Act No. 424, General Acts 1949, page 601.

This Act, passed by the 1949 Legislature of Alabama, with effective date of November 1, 1949, now governs the casting of absentee ballots within this State in all primary, general, special and municipal elections. Such act specifically provides that all laws and parts of laws in conflict therewith, and particularly Act No. 478, General Acts 1945, page 711, are repealed thereby. Section 1 of Act No. 424, supra, is as follows:

"The provisions of this Act shall apply to all primary, general, special and municipal elections held in the State of Alabama."

It is, therefore, my judgment that it is mandatory that absentee voting be provided for in the election mentioned in your request for opinion.

It is true that in an opinion rendered to the Honorable M. M. Multhrop, Mayor, City of Eufaula, Barbour County, under date of April 4, 1947 (Quarterly Report of Attorney General, Vol. 47, page 13), I held that it was not mandatory that absentee voting be provided for in a special election in which the residents of a city are voting upon the question of adopting a commission form of government. This opinion was predicated upon the fact that Act No. 478, General Acts 1945, supra, the predecessor of Act No. 424, here considered, did not include within its preview "special" elections, and also the fact that the procedure governing the casting of absentee ballots, as outlined by Act No. 478, supra, would not allow the casting of absentee ballots in an election such as that referred to by Mayor Moulthrop.

I find none of these objections here existing for the reason, as heretofore set out, that the provisions of Act No. 424, supra, are made specifically applicable to municipal elections, and further that the provisions of such act are of no hindrance in the matter of time toward the casting of absentee ballots in such an election.

Answer to your second inquiry is to be found within Section 18 of Act No. 424, supra. This section provides as follows:

"Section 18. In any municipal election that is held at a time different from a primary or general election, the duties with reference to the handling of absentee ballots which are required in this Act to be performed by the register shall be performed by the * * * *

clerk or other officer performing the duties of the clerk. In the event the clerk or other officer performing the duties of the clerk is also a candidate in the election, the governing body of the city or town shall appoint a qualified elector of the city or town to perform the duties. Any such city or town official or employee or person shall have all the powers, duties, and responsibilities of the register under this Act and shall be entitled to the compensation provided by Section 17, above."

In your request for opinion, you advise that the election mentioned by you is to be held at a time different from the holding of any other primary or general election, and I am, therefore, of the opinion that, in such event, the city clerk, or other officer performing the duties of the clerk, is the person charged with performing the duties prescribed by Act No. 424, supra, with reference to the casting of absentee ballots.

In arriving at such conclusion, I of necessity have had to determine whether the election to which you refer is a municipal election or a primary election. Quite obviously, it is both, perhaps being best styled as a municipal-primary. However, in my judgment, it is first and foremost a municipal election, be it a municipal-primary or a municipal-general election, and I am of the opinion that the provisions of Act No. 424, supra, applicable to municipal elections, should here govern.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 27, 1950.

Hon. Edward A. Ling, Chairman,
Democratic Executive Committee,
City of Bessemer,
1813½ Third Avenue,
Bessemer, Alabama.

Elections—Municipalities—State Democratic Executive Committee.

1. Act No. 429, General Acts 1949, page 616, changing the municipal form of government of Bessemer, Alabama, has no legal effect on the Democratic Executive Committee of the city of Bessemer, Alabama.

2. Whether or not the Democratic Executive Committee of the city of Bessemer is a de jure body, and, thus, has a legal right to hold a Democratic primary election in the Spring of 1950, for the purpose of electing Democratic nominees for the general election to be held on the third Monday in September, 1950, is a question that directs itself to the State Democratic Executive Committee and the rules thereunder obtaining.

3. By virtue of Title 17, Section 343, Code of Alabama 1940, the cost of primary elections held for municipalities or for the election of municipal officials is paid for out of the treasury of such municipality.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of October 25, 1949, is as follows:

"Altho on October 31, 1946 the City of Bessemer voted to change to the Commission Form of Government under Article 1, Chapter 4, Title 37, 1940 Code of Alabama, the City has retained the same Democratic Executive Committee as that elected in 1944, due to the fact there has been no election since 1944 for the election of Committeemen.

"As Chairman of the Democratic Executive Committee of Bessemer, Alabama, on October 17, 1947, I requested an official opinion as to the legal status of the Committee; and you graciously rendered your opinion under date of November 17, 1947, therein directing my attention to your opinion of October 8, 1947, addressed to Honorable Joe F. Lewis, President, Board of Commissioners, Bessemer, Alabama.

"In Regular Session, 1949, Act No. 429, H. 966, our Legislature enacted a law pertaining to Bessemer's Board of Commissioners, approved August 23, 1949, hereinafter referred to as Act No. 429, and among other things, provides for an election of Commissioners to be held on the third Monday in September, 1950.

"As Chairman of the Democratic Executive Committee of Bessemer, Alabama, I am kindly requesting your official opinion on the following questions, viz:

"1. What legal effect does Act No. 429 have upon the present Democratic Executive Committee of the City of Bessemer, Alabama?

"2. In view of Act No. 429, will the Democratic Committee of Bessemer, Alabama, have the legal right to hold a democratic primary election in the spring of 1950, for the purpose of electing democratic nominees for the general election to be held on the third Monday in September, 1950, and for general elections thereafter?

"3. If question number 2 is answered in the affirmative, will the Committee be justified in using its funds to finance such primary elections, or will the City of Bessemer, Alabama, be liable for the financing thereof?"

Act No. 429, General Acts 1949, page 616, to which you refer, in effect, abolishes the then existing Board of Commissioners of the City

of Bissemmer, and, in lieu thereof, creates a Board of Commissioners for said city, having such powers, authority, etc. as prescribed in said act.

The effective date of the act is incorporated in Section XXIV thereof. I interpret Section XXIV as providing, in substance, for two contingent effective dates for the act. The first is ninety days after passage and approval, if the second contingency does not arise. The second is upon petition being filed with the Judge of Probate of Jefferson County within thirty days after passage and approval, calling for a city election on the question within ninety days after passage and approval, said petition bearing the signatures of a stated number of qualified electors and the act becoming effective if and when approved at such referendum election.

The act was duly passed by the legislature and approved August 23, 1949. I assume that the latter contingency was not acted upon; or, if so, the election result was favorable. Therefore, the effective date of the act would be ninety days from August 23, 1949, or, to-wit, November 21, 1949, or at such earlier date that the act might have been approved at a referendum election.

In any event, the act has been officially in effect since November 21, 1949, and laying aside any constitutional considerations must now be considered as the statutory law of this State.

Section III of the act, in effect, provides that from and after the effective date of the act, the old members of the Board of Commissioners shall become the new members of said board and shall serve until their qualified successors are duly elected.

Section IV of the act, in effect, provides that their qualified successors shall be elected on the third Monday in September, 1950, to take office on the first Monday in October, 1950; and a subsequent election shall be held every four years thereafter.

From a review of the act in its entirety, it is my opinion that those sections of the act commented upon and all attendant sections deal with election provisions under the terms of the act as related to our general State election laws. I observe nothing in the act that would tend to have any legal effect upon the status quo of political party functioning; and, thus, it is my opinion that said act has no legal effect on any Democratic Executive Committee of the city of Bessemer.

Your first question is, therefore, answered accordingly.

In your second question, you ask whether or not, in view of Act No. 429, supra, the Democratic Executive Committee of Bessemer, Alabama, has the legal right to hold a Democratic primary election in the Spring of 1950, for the purpose of electing Democratic nominees for the general election to be held on the third Monday in September, 1950.

As commented on in answer to your first question, it is my opinion that Act No. 429, supra, bears no relation to the functioning of political

parties, nor to the method or manner of providing the Democratic nominees from office in the city of Bessemer. You state in your letter of request for an opinion that the city of Bessemer has retained the same City Democratic Executive Committee since 1944. It is my understanding that the members of the City of Bessemer Democratic Executive Committee were elected in 1944 to serve a term of four years. Therefore, their terms of office would normally have expired in 1948. I take it that your second question is whether or not the aforementioned members have carried over in office and are regular, valid and de jure members of the Democratic Executive Committee of the city of Bessemer.

It is my opinion that this question should probably be directed to the State Democratic Executive Committee, to be determined by it, in accordance with applicable statutory provisions and party rules and regulations. I call your attention to Title 17, Section 341, Code of Alabama 1940, which I deem to be the pertinent State law controlling your case, and which is quoted for your information as follows:

"There may be provided a committee of each party for the state and each political subdivision of the state, including counties and municipalities, said committees to be selected in such manner as may be provided for by the governing authority of each party, but if there shall not be elected or chosen any committee for any county or municipality, then all the powers which could be exercised by any such committee shall be vested in the state executive committee, under such rules and regulations as the governing authority of the party may designate; provided, however, that should no committee be elected or chosen from any municipality in the state, then the executive committee of the county in which said municipality is located shall exercise the powers and perform the duties of the executive committee of such municipality. The state executive committee may provide for the selection of any such committee."

Your second question is, therefore, answered as above noted.

In answer to your third question, your attention is called to Title 17, Section 343, Code of Alabama 1940:

"The compensation of officers and other expenses of any and all primary elections, general or special, held under the provisions of this chapter shall be paid for in the same manner and to the same extent as is or may be provided by law for the payment of the expenses and officers of general elections held under the general election laws of Alabama, and to be paid out of the county treasury in the same manner; provided, however, that the cost of such primary elections held for municipalities or for the election of municipal officers or officials shall be paid for out of the treasury of such municipality." (Emphasis supplied.)

Noting the underscored portion of the statute above, it is observed that the cost of primary elections such as here discussed shall be paid from the treasury of the municipality.

Your third question is answered accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 30, 1950

Hon. T. G. Kirby, Sheriff,
Rondalphe County,
Wedowee, Alabama.

Sheriffs—Counties—Costs and Fees—Roads and Bridges.

County governing bodies may consider and allow a claim of the sheriff for road duty provided by Title 11, Section 34, Code of Alabama 1940, notwithstanding that the claim therefor was not presented within the twelve months limitation of the statute of nonclaims (Titles 12, Section 118, Code of Alabama 1940).

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1950, is as follows:

"Please give me a ruling on the following claim.

"In January 1948 I failed to file claim for the \$90.00 for road service, allowed me under Title 11 Section 34, Code of Alabama for the year of 1947. I filed this claim one year later (January 1949). Does the Statute of limitations bar me in regard to this claim? Can the commissioners Court pay this claim (If they are willing) without it being charged back."

In answer to your inquiry, it is my opinion that your claim for road service made under the authority of Title 11, Section 34, Code of Alabama 1940, is such a claim as must be presented to and allowed by the county governing body (Quarterly Report of Attorney General, Vol. 12, page 212), and that upon failure to present such claim within twelve months of the date upon which the services was rendered, it was barred by the statute of nonclaims. Title 12, Section 118, Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 50, page 204.

However, since you have actually performed services for the use of the county, it is my opinion that the County Commissioners could consider and allow your claim therefor if it should choose to do so under Title 12, Section 110. Quarterly Report of Attorney General, Vol. 14, page 304; Quarterly Report of Attorney General, Vol. 26, page 134. Section 110, *supra*, reads as follows:

"§ 110. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims, on account of a defect in any law or any other reason."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 30, 1950

Hon. James S. Saliba,
The Adjutant General,
State Military Department,
CAPITOL.

State Military Department—Armory Commission of Alabama
—State-Owned Personal Property.

1. The provisions of Act No. 627, General Acts 1949, page 967, are applicable to the State Military Department and to the Armory Commission of Alabama.

2. Such act requires the prior approval of the Chief of the Division of Service only for the transfer of state-owned personal property from one State department to another, and does not require such approval for property transfers within one such department or agency, such being the responsibility of the property officer of such department or agency alone.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of November 18, 1949, is as follows:

"Reference is made to Act No. 627 of the 1949 Session of the Legislature of Alabama, approved September 19, 1949, which sets up certain provisions and requirements with reference to inventorying and accounting for State owned personal property in the custody of various State departments and agencies. The Chief of the Service Division, Department of Finance, who is charged with the direction of this program by this Act, has called upon this Department to comply with the provisions of the Act with reference to all State owned personal property in the custody of the State Military Department, the Armory Commission of Alabama and of the Militia (including the National Guard) of the State.

"Your attention is invited to Section 23, Title 35, Code of Alabama 1940, and particularly to the last sentence thereof. Under the provisions of this Code section I have been acting as the exclusive custodian of all State property in the custody of the military units of the State, of the State Military Department (as a Headquarters of the military forces of the State) and of the Armory Commission of Alabama, have prescribed rules and regulations pertaining to the care, accountability, responsibility, and disposition thereof, and have been maintaining inventories thereof. Such property includes not only property of the types normally used by civilian agencies but also much property or equipment and supplies of a nature peculiar to military units.

"As you well know, the State Military Code (Title 35) requires the Adjutant General in the organization and administration of the Military Department and the military forces of the State to conform as nearly as practicable to the regulations, customs and practices of the Army and Air Force of the United States. Since the State military forces are parttime organizations, they can ill afford the time for learning or complying with several entirely different types of procedures of the same general character. On the other hand, if their procedures with reference to State matters are patterned after Army procedures of the same nature, they receive all the more training and practice in the practices and procedures they will have to follow when called into active Federal service for the defense of the Nation. It is believed that the Legislature, in enacting Section 23 of the Code and granting The Adjutant General the exclusive jurisdiction as to State owned property in his Department and the State military forces gave recognition to the peculiar differences between the State Military Department and these units as against those of an ordinary Department of civilian nature. In my opinion these distinctions are still just as significant and deserving of continued recognition.

"It is noted that Act No. 627 carries no provisions repealing any other laws. I, therefore, am in the position of needing to know whether I am required and justified in continuing to operate under the provisions of Section 23, Title 35 of the Code, or whether I must now comply with Act No. 627.

"There are many ways in which the provisions of Act No. 627 do not conform to the practical requirements and operations of the Military Department and State military forces. Having had much military experience, I am sure that you will recognize these problems upon analysis of the Act. As an instance, Act No. 627 requires that the transfer of any personal property between agencies or employees of the same agency be approved by the Chief of the Service Division, Department of Finance. Suppose several military units in active military service of the State are employing State owned property, and it becomes necessary to transfer such property between units or supply officers, or detachment commanders, it would be ridiculous to require the approval of the above-named officer to such transactions, yet that is what the law appears to say.

"As you know, the Armory Commission of Alabama is, in effect, a 'holding company' for the purpose of holding title to military real estate and for building and providing Armory and similar training facilities for the military units, including the provision of furniture and equipment for occupying units of the type that would come under the heading of 'buildings and equipment pertaining thereto.' All personal property of such character is really and necessarily issued to and used by the military units occupying such facilities. Since the Armory Commission has no personnel, The Adjutant General actually provides the personnel and tends to performing such functions on behalf of the Commission. Therefore, it appears to me that for all practical purposes concerning custody of and accounting for personal property of the Armory Commission, the provisions of Section 23 cited above should apply, if still in force.

"In view of the foregoing, your opinion is requested as follows:

"1. Am I authorized to continue to function in accordance with the provisions of Section 23, Title 35, Code of Alabama 1940, without regard to the provisions of Act No. 627, 1949, or must I conform to the latter statute, with reference to State owned personal property in the custody of the military forces of the State?

"2. The same question as Question No. 1 with reference to State owned personal property in the custody of the State Military Department, bearing in mind that Section 1, Title 35, Code of Alabama 1940, defines the Military Department as being the 'headquarters' of the militia, naval militia, and National Guard, and further bearing in mind that much of the personal property in the custody of the State Military Department is of a military nature awaiting distribution to military units or being held in central storage until the time of actual need by military units.

"3. The same question as Question No. 1 with reference to personal property of the Armory Commission of Alabama, since such personal property is necessarily issued to, in the custody of, and used by the military units of the State occupying various Armories and facilities provided by the Armory Commission.

"It will be appreciated if you can give me an early opinion in answer to the above questions in order that I may know which statute I am governed by and can make prompt compliance with the proper statute. Attention is invited to the fact that Act No. 627 provides penalties in the amount of \$5.00 per day against me and others for the duration of noncompliance with the provisions of that Act, and other penalties, and I do not wish to be subjected to such penalties."

In giving answer to the inquiries presented by your request for opinion, reference need be had to the provisions of Act No. 627, General Acts 1949, page 967, which act prescribes a procedure and fixes the responsibility for maintaining control of the personal property of the State of Alabama and fixes a penalty for neglect of any duty imposed by such act.

You inquire as to whether the provisions of such act are applicable to state-owned personal property in the custody of the State Military Department and the Armory Commission of Alabama.

In my judgment, answer to your inquiry must be in the affirmative.

Act No. 627, *supra*, provides that the Chief of the Division of Service of the State Department of Finance shall establish a control in the following manner of all nonconsumable state personal property hereinafter exempt in Section 4 of such act. Such act then sets up the system of control to be placed into effect. Section 4 of such act exempts from the provisions thereof certain designated institutions, agencies and other items, but does not include either the State Military Department or the Armory Commission of Alabama. Inasmuch as the farmers of such act have seen fit to set out and enumerate the specific exemptions therefrom, which does not include the State Military Department or the Armory Commission of Alabama, it is my judgment that such agencies are not exempt from the provisions of such act.

In your request for opinion, you set out certain facts which you seem to feel make the provisions of Act 627, *supra*, unworkable and inoperative insofar as the State Military Department and the Armory Commission of Alabama are concerned. You apparently base such contentions upon your belief that you would not be permitted to transfer any state-owned personal property between the various units of the militia, naval militia, or National Guard of the State, without prior approval of the Chief of the Division of Service. I do not accord any such construction to Act No. 627, *supra*. Rather, such act provides within Section 1, Subsection (c) thereof, that:

"(c) No such property shall be disposed of, transferred, or assigned, or entrusted to any other department, agency or employee thereof without the written permission of the Chief of the Division of Service." (Emphasis supplied.)

It is my construction of the above provision that same merely provides that in the event property is transferred from one State department

to another, that the approval of the Chief of the Division of Service must be secured. In my judgment, such provision has no application to transfers within a department or agency, such being the responsibility of the property officer of such department or agency alone. It, therefore, follows, and it is my opinion, that you may continue to make transfers within the various units of your department in the same manner as you have heretofore done without securing the prior approval of the Chief of the Division of Service, and that it is only in the event that you desire to transfer state-owned personal property to some other State agency or department that you must secure such approval.

In your request for opinion, you have called my attention to the provisions of Title 35, Section 23, Code of Alabama 1940. Such statute provides, in pertinent part, as follows:

"* * * The adjutant general shall be the exclusive custodian of all state property in the custody of the militia, or of any unit or headquarters thereof, and he shall maintain a perpetual inventory thereof, and shall prescribe reasonable rules and regulations for the care, accountability, responsibility, and disposition thereof."

It is my judgment that you should continue to operate not only under the provisions of Act No. 627, supra, but likewise under the provisions of Title 35, Section 23, above set out.

In conclusion, it is my opinion, that the provisions of Act No. 627, supra, are applicable to the State Military Department and the agencies thereof, as well as the Armory Commission of Alabama, and that in view of the provisions of Title 35, Section 23, supra, compliance with the system of control prescribed by Act No. 627, supra, should not be difficult upon your part for the reason that you undoubtedly already have an inventory of the state-owned personal property in the custody of each of these agencies or organizations.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 30, 1950

Hon. W. O. Brownfield,
Clerk, Circuit Court,
Lee County,
Opelika, Alabama.

Lee County—Costs and Fees—Inferior Courts.

The clerk of the Court of Common Pleas of Lee County is not entitled to retain five per cent of moneys remitted to the State collected for violations of Title 36, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 12, 1950, is as follows:

"Please refer to the Act of the Legislature, approved July 15, 1949, which abolished the County Court of Lee County, Alabama and established in lieu thereof, the Court of Common Pleas, and which made the clerk of the Circuit Court, clerk of the Court of Common Pleas; and which Act by Section 8(b) gives to the Court of Common Pleas, exclusive jurisdiction of Offenses involving Rules of the Road—does this Act confer authority on the Clerk to deduct the usual commission of 5% for fines collected and reported to the State, in those cases of misdemeanors for violations of the Rules of the Road?

"Please consider this question in the light of said Act, Section 7 which reads in part, ' . . . the Court shall have authority to tax costs and commissions for the use of officers of the county as follows: . . . ' And again, Section 11(a) of said Act which reads in part, ' . . . in addition to his regular fees, commissions and compensations, the clerk . . . ' "

In my opinion, the clerk of the Court of Common Pleas of Lee County, Alabama, is not entitled to retain five per cent for fines collected and remitted to the State in cases of misdemeanors for violations of the Rules of the Road.

We have recently held that the Court of Common Pleas of Lee County has exclusive jurisdiction over cases involving violations of the Rules of the Road and over misdemeanors defined in Title 36, Code of Alabama 1940. Opinion of the Attorney General to Hon. Bankhead Bates, Director, Department of Public Safety, under date of January 6, 1950 (Ms.). See also Section 8(b) of Act No. 242, General and Local Acts 1949, page 361.

In providing for costs and fees, Act No. 242, supra, provides in Section 7 thereof as follows:

"Section 7. . . . (b) in addition to the fees for witnesses, the court shall have authority to tax costs and commission for the use of the officers of the county: . . . (3) in each criminal case involving an offense of which justices of the peace have final jurisdiction the same as in justice courts; (4) in every other criminal case the same as in county courts, including fees as provided by Sections 86 and 87 of Title 11, of the Code of 1940, except that fees for cases provided for hereinafter under Section 8(b) the fees shall be as there stated."

Section 8(b) referred to above provides that the court costs in cases arising under Title 36, Code of Alabama 1940, shall be the same as in

the courts of justices of the peace. I find no provision in the local act, *supra*, allowing to the clerk of the Court of Common Pleas a fee of five per cent for collecting and remitting money to the State of Alabama.

In my opinion, Section 8(b), providing for costs in the Court of Common Pleas of Lee County for offenses involving violations of the Rules of the Road or misdemeanors provided for in Title 36, Code of Alabama 1940, authorizes the clerk of the Court of Common Pleas to collect justice of the peace fees in such cases. We have heretofore held that justices of the peace are not entitled to deduct five per cent in remitting such fines to the State. Quarterly Report of Attorney General, Vol. 17, page 78, 82.

It is further my opinion that Section 11(a) of the local act, *supra*, referred to in your inquiry, does not authorize the clerk of the Court of Common Pleas of Lee County to retain five per cent commission on moneys remitted to the State.

As a general rule, only the circuit clerk is entitled to receive commission on moneys remitted to the State as approved for in Title 11, Section 22, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 20, page 284. I find nothing in the act creating the Court of Common Pleas of Lee County which would authorize the clerk of that court to retain said five per cent in the case referred to in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 31, 1950.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Licenses—Chain Store.

Where the ownership of two stores handling the same character of merchandise is involved, and one store is owned entirely by an individual as such, and where the other store is a corporation, but one-half of its stock is owned by the same individual, under the provisions of Title 51, Sections 626 and 627, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945, such stores are a chain, and are subject to the license fees as such under Section 624, Title 51, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of December 15, 1949, is as follows:

"A representative of the State Department of Revenue has served upon A. J. Feldmann, Florence, Alabama, and upon Shirley's-Tuscumbia, Inc., a corporation organized under the laws of Alabama, citations to purchase chain store licenses. A. J. Feldmann operates a retail store in Florence, Alabama, selling women's apparel. He owns and operates the business individually. Shirley's-Tuscumbia, Inc., operates a retail store for the sale of women's apparel in Tuscumbia, Alabama. This corporation has outstanding 250 shares of stock. A. J. Feldmann owns 125 shares, Hattie K. Feldmann, his wife, owns one share, and Shirley R. Adler owns 124 shares. The Tuscumbia store is under the management of the said Shirley R. Adler. Neither she nor the said Hattie K. Feldmann own any interest in the Florence store. I am advised that the buying for the Florence store is done by A. J. Feldmann, that the buying for the Tuscumbia store is done by the said Shirley R. Adler, and that no buying is done for both stores by the same person, firm or corporation.

"The State Department of Revenue contends that these two stores constitute a chain within the meaning of Article 3 of Title 51 of the Code of Alabama, 1940. The owners of these stores contend that since the stockholders of Shirley's-Tuscumbia, Inc., other than A. J. Feldmann, have no interest in the Florence store, operated by the said Feldmann, and since the buying for the two stores is not done by the same person, firm or corporation, the two stores should not be classed as a chain for the purposes of the said Article 3.

"I will appreciate your opinion as to whether these two stores should be classed as a chain and as to whether they should be required to obtain licenses as a chain."

Title 51, Section 624, Code of Alabama 1940, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945, the statute levying the so-called chain store license is quoted in applicable part as follows:

"Every person, firm, corporation, association, or co-partnership operating, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of operating, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in sections 621 and 623 of this title and shall be in addition to all other license or privilege taxes levied by this section or hereafter levied."

Another pertinent statute is Title 51, Section 627, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945, which purports to define for the purpose of Article 3, what constitutes a chain of stores coming under the same ownership or control, and also is an appropriate part, as follows:

"Two or more stores or mercantile establishments shall, for the purpose of this article, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or any group of persons having a common interest therein."

Practically the same situation as presents itself in this case existed in the case of an opinion of this office addressed to Hon. Frank A. Reagan, Judge of Probate, Etowah County, Gadsden, Alabama, and reported in Quarterly Report of Attorney General, Vol. 55, page 6, and in which it was held that the two stores involved there constituted a chain, and as such were subject to the chain store license under Section 624, *supra*. The facts of the two cases are very similar. Moreover, under somewhat similar circumstances, and in the opinion reported in Quarterly Report of Attorney General, Vol. 54, page 155, it was also held that the three stores involved in that case constituted a chain.

The only material difference in the facts in their case from those in the two opinions of this office just referred to, is that Mr. Feldmann in this case owns one of the stores involved, the Florence store, in its entirety and as an individual. He owns in the other store, situated at Tuscumbia, and which is a corporation, 125 shares of the 250 shares of stock outstanding. Of the remainder, his wife, Mrs. Hattie K. Feldmann owns one share, and Miss Shirley R. Adler of Tuscumbia the other 124 shares. Thus Mr. Feldmann and his wife through their 125 shares and 1 share, respectively, own the controlling interest in the Tuscumbia store. Even considering the foregoing, there seems to be only a slight technical difference here from the facts concerning the ownership of the two stores involved in the opinion of this office reported in Vol. 55, page 6.

Section 627, *supra*, makes the test, "* * * two or more stores or mercantile establishments * * * under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons * * *."

The same statute also goes on to further provide:

"* * * or if any part of the gross revenues, net revenues, or profits, from any such stores or mercantile establishments shall

directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, or any single person or any group of persons having a common interest therein * * * *." (Emphasis supplied.)

It is true according to the facts submitted by you that Mrs. Hattie K. Feldmann and Miss Shirley R. Adler owns no interest in the Florence store. However, Mr. Feldmann does have absolute ownership and control of the Florence store and is owner of one-half of the shares of stock in the Tuscumbia store. And in fact he and his wife, Mrs. Hattie K. Feldmann, through the 126 shares owned and held by both, have the controlling interest in the Tuscumbia store.

While this office seems to have never decided this specific point before, it seems clear from the very language of the statutes just quoted that the absolute ownership of Mr. Feldmann in the Florence store and his ownership of one-half of the shares of stock in the Tuscumbia store is sufficient to treat his said interest in the two stores as a "single or common ownership," as is contemplated by Section 627, *supra*; notwithstanding the fact that Mrs. Feldmann and Miss Adler have no interest in the Florence store. Section 627, *supra*, therefore, contemplates "a single" ownership or a ownership held by a single person, as well as that owned by "any group of persons," where such ownership is held in "two or more stores."

The fact that the Tuscumbia store is under the management of Miss Adler, and that she does the buying for that store, and that no buying is done for both stores by the same person, firm, or corporation, is immaterial. Either "ownership" or "control," one or the other, standing alone, would be sufficient under Section 627, *supra*. The two words are used in the statute not as inseparable units, but in the alternative. Mr. Feldmann's said ownership in the two stores is enough under Section 627, *supra*, to bring them within the meaning of Section 624, *supra*, as chain stores. It makes no difference under said statutes whether one store is an individual business and the other a corporation, the deciding factor is "single or common ownership" or "control" in one person or a group of persons.

In speaking of the degree of ownership which is necessary in a person, firm, or corporation, in "two or more stores" for the purpose of Section 624, *supra*, Title 51, Section 626, Code of Alabama 1940, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, provides that:

"The provisions of this article shall be construed to apply to every person, firm, corporation, co-partnership, or association, either domestic or foreign, which is controlled or held with others by stock ownership of twenty-five percent or ultimately controlled or directed by one management or association of ultimate management, or the buying for said store or stores is centralized or done by one person or management."

It, therefore, clearly appears that Mr. Feldmann's entire ownership of one store and ownership of one-half of the shares of stock in the other store would from the standpoint of such ownership bring such stores within the purview of Section 624, *supra*, as a chain of stores.

This is particularly true in view of the fact that both stores handle merchandise of the same character, namely, clothing, or more specifically, ladies apparel. Thus, the proviso or exception contained in the last sentence of Section 627, *supra*, and applying where not more than two stores are involved which handle merchandise of a different character, would not apply here.

The foregoing being considered, it is obvious that the two stores about which you made inquiry are to be considered for the purpose of said statutes as chain stores, and subject to the license fees for such.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 1, 1950.

Hon. J. C. Griffin,
Judge of Probate,
Perry County,
Marion, Alabama.

Elections—Merit System—Legislature.

1. Title 55, Section 317, Code of Alabama 1940, prohibits an employee in the classified service of the State from being a candidate for nomination or election to any public office; and is applicable during the pendency of candidacy for nomination in a party primary or election in a general election, whether opposed or unopposed. Leaves of absence for purpose of becoming a candidate are unauthorized.

2. Member of Legislature may be employed in the classified service of State during his term of office. When so employed after election leaves of absence may be granted during legislative sessions.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1950, is as follows:

"I will appreciate your official opinion upon the following questions as soon as possible due to the fact that they are concerning the coming elections.

"1. Can a person who is employed by the State under the Merit System take a leave of absence from his State work in order to run for the State Legislature?

"2. If elected, can said State employee take a leave of absence from his State work when the Legislature is in session and return to work when the Legislature adjourns?

"3. If said State employee has no opposition in his race for the Legislature, would it be necessary for him to take a leave of absence or resign from the State service, and if so, when could he go back to work for the State?

"4. If you rule that opposition or no opposition, the employee must leave the service of the State for a race and he won nomination in the May primary, could he return to his State work immediately, all other conditions being satisfactory to his employer?

"In other words I would like to know if a man would have to be away from his State work from March 1, 1950, through November election day 1950, whether he had apposition or not, or would he only have to be away from his State work from March 1, 1950, until the day of the first primary in May, 1950, if he had no opposition."

In answer to your inquiries, attention is invited to Title 55, Section 317, Code of Alabama 1940, which provides in pertinent part as follows:

"§ 317. Political activities prohibited.— . . . No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. Provided, however, nothing herein shall prohibit any person in the classified service from serving out the terms of a party office for which he had been elected at the time this chapter goes into effect. Any officer or employee in the classified service who violates any of the foregoing provisions of this section shall forfeit his office or position."

Positions in the service of the State are divided into the exempt, the unclassified, and the classified service.—Title 55, Section 301, Code of Alabama 1940. Since Title 55, Section 317, *supra*, quoted in part above, is applicable only to those in the classified service, I shall assume your inquiries pertain only to one in the classified service, and my answers are hereby limited accordingly.

In a recent opinion of this office rendered to Hon. Frank Haynes, Member of the Legislature (Quarterly Report of Attorney General, Volume 53, page 103), that portion of the opinion of this office appearing in Quarterly Report of Attorney General, Volume 43, page 46, holding that an employee in the classified service may, under certain circumstances,

be a candidate for nomination or election to a public office and retain his position in the classified service, was expressly overruled as being contrary to the plain, clear and unambiguous language of the first sentence of the above quoted portion of Title 55, Section 317, *supra*.

The first sentence of the above quoted portion of Title 55, Section 317, *supra*, specifically prohibits an employee in the classified service of the State from being a candidate for nomination or election to any public office. This includes a candidate for nomination in a party primary, whether opposed or unopposed. It also includes a candidate for election in the general election, whether opposed or unopposed. It likewise includes the nominee of a party whose nomination may be considered as tantamount to an election in the general election. The prohibition is against being a candidate and applies as long as the candidacy exists. The candidacy does not terminate until the candidate is defeated in or withdraws from the party primary, or withdraws from or is elected or defeated in the general or final election.

If an employee in the classified service becomes a candidate for nomination or election to any public office, without first resigning, he would forfeit his office or position under the last sentence of the above quoted portion of Title 55, Section 317, *supra*. There is no provision of law authorizing leaves of absence in this regard. If he becomes such candidate, he relinquishes his office or position held under the Merit System. However, after his candidacy terminates, there is no inhibition against a new employment in the State service, if otherwise qualified.

In the opinion of this office to Hon. Frank Haynes, referred to above, it was also held that there is no constitutional or statutory provision prohibiting a member of the Legislature of Alabama from being employed in the classified service of the State during his term of office. This applies only to the time after election in the general election and not to the pendency of candidacy for nomination or election. A legislator, employed in the classified service of the State after his election, may be granted a leave of absence during legislative sessions and return to work after adjournment.

The above, though not answering your specific inquiries categorically, should give you the information you desire.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1950.

Honorable John Graves,
State Comptroller,
Department of Finance,
CAPITOL.

Constitutional Amendments—Governor's Proclamation—State
—Counties—Municipalities—Title 12, Section 132, Code of Ala-
bama 1940.

1. Cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting the State as a whole and no one county individually, is chargeable to the State.

2. Cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments applicable to one county alone, is chargeable to the individual county concerned.

3. Cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting more than one county individually but not affecting the State as a whole, is chargeable to the individual counties concerned, each county to pay its prorata share of such expenses.

4. Cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting only one designated municipality alone, is chargeable to the individual municipality concerned.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1949, is as follows:

"Please furnish me your official opinion in connection with the reimbursement by the counties of expenses incurred by the State in the publishing of the proclamations issued by the Governor in connection with the election held December 13, 1949, upon some nine proposed amendments to the Constitution, the issuance of said proclamations being required under the provisions of Section 284, Constitution of Alabama, 1901, as amended.

"Please advise me whether any such amendment is state-wide in scope and effect or whether any amendment is applicable only to a single county or counties of the state."

In construing Title 12, Section 132, Code of Alabama 1940, regarding the payment of publication costs of Governor's Proclamations submitting proposed amendments to the Constitution, affecting counties or subdivisions thereof, this office has held as follows:

1. The cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting the State as a whole and no one county individually, is chargeable to the State.

2. The cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments applicable to one county alone, is chargeable to the individual county concerned.

3. The cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting more than one county individually but not affecting the State as a whole, is chargeable to the individual counties concerned, each county to pay its prorata share of such expenses.

4. The cost of publication of Governor's Proclamation, in regard to proposed constitutional amendments affecting only one designated municipality alone, is chargeable to the individual municipality concerned.

Quarterly Report of Attorney General, Volume 54, page 128; Quarterly Report of Attorney General, Volume 53, page 180; Biennial Report of Attorney General, 1934-36, page 583.

Applying the above principles to the various constitutional amendments voted on in the election held December 13, 1949, I have reached the following conclusions in regard to the payment of the cost of publishing of the proclamations issued by the Governor concerning said amendments:

Amendment No. I, authorizing the State to issue bonds for the construction of hospitals (General Acts of Alabama 1949, page 694), is statewide in its scope and affects the State as a whole and no one county individually. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to the State.

Amendment No. II, authorizing Marion County, Alabama, to levy and collect taxes for hospital purposes, and creating a debt therefor (General Acts of Alabama 1949, page 698), is applicable to Marion County alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment, is chargeable only to Marion County, Alabama.

Amendment No. III, providing for the use of proceeds of taxes levied for hospital purposes (General Acts of Alabama 1949, page 897), is applicable to all counties in the State except Mobile and Jefferson Counties. It affects more than one county individually, but not the State as a whole. Therefore, the cost of publishing the Governor's Proclamation is chargeable to the individual counties concerned, that is, all except Mobile and Jefferson Counties; and each of the other sixty-five counties is to pay its respective prorata share of such expenses.

Amendment No. IV, regulating the fees, allowances, commissions, and salaries of the county officers of Franklin County, Alabama (General

Acts of Alabama 1949, page 376), is applicable to Franklin County alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to Franklin County, Alabama.

Amendment No. V, prohibiting the granting of a franchise to a public utility for a period of more than thirty years in the City of Phenix City, Alabama (General Acts of Alabama 1949, page 418), is applicable to the City of Phenix City alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to Phenix City, Alabama.

Amendment No. VI, authorizing the levying of additional ad valorem taxes for school purposes in St. Clair County, Alabama (General Acts of Alabama 1949, page 467), is applicable to St. Clair County alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to St. Clair County, Alabama.

Amendment No. VII, authorizing the levying of additional ad valorem taxes for school purposes in Cherokee County, Alabama (General Acts of Alabama 1949, page 657), is applicable to Cherokee County alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to Cherokee County, Alabama.

Amendment No. VIII, authorizing the levying of additional ad valorem taxes for school purposes in Lawrence County, Alabama (General Acts of Alabama 1949, page 690), is applicable to Lawrence County alone. Therefore, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to Lawrence County, Alabama.

Amendment No. IX, authorizing the levying of additional ad valorem taxes and the issuance of bonds for school purposes in the school district in the City of Huntsville, Madison County, Alabama (General Acts of Alabama 1949, page 691), in my judgment, is applicable to the City of Huntsville alone. I am informed that the school tax district of the City of Huntsville is coextensive with the city limits of Huntsville. The inhabitants of the City of Huntsville alone are affected by the amendment. It affects no territory outside of the city limits of the City of Huntsville. Therefore, in my opinion, the cost of publishing the Governor's Proclamation in regard to this amendment is chargeable only to the City of Huntsville, Alabama.

The above will give you the information you desire in regard to your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1950.

Hon. J. T. Land, Sr., Chairman,
Board of Revenue,
Walker County,
Jasper, Alabama.

1. If a claim is presented to a county governing body within twelve months after the time it accrues or becomes payable, and no action is taken on the name for six years, such claim is barred by the statute of limitations, and cannot be paid under the equitable claims statute (Title 12, Section 110, Code of Alabama 1940).

2. Quarterly Report of Attorney General, Vol. 14, page 275, overruled insofar as it is in conflict with the conclusion reached herein.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of October 15, 1949, is as follows:

"Between the period from February 5, 1940 to March 27, 1942, the Georgia-Carolina Oil Company, a corporation, sold and delivered upon open account certain goods and merchandise to Walker County. There is no dispute as to the delivery of this merchandise and goods and the records reflect that the sum of \$5807.72 was paid on the account of \$6533.04, leaving a balance unpaid of \$725.32.

"The said Georgia-Carolina Oil Company, a corporation, has, as of the 17th day of June, 1947, transferred and assigned this account to Mr. W. H. Rollins with full power and authority to sue, collect or compromise this account and he has now presented this account for payment.

"It is the desire of the Board to pay this account but your official opinion as to whether or not the above account is barred by our statute of limitations is respectfully requested. If you decide that the Board can, in their discretion, pay this account, we ask you to further determine if it will be legal for us to pay, in addition to the principal sum, a legal rate of interest on said account.

"I thank you for your kind attention to this matter."

Claims against a county which are required to be audited and allowed by the Board of Revenue or other like governing body must be presented for allowances and payment within twelve months after the time they accrue or payment payable, or the same are barred by the statute of nonclaims as set out in Title 12, Section 118, Code of Alabama 1940.

State ex rel City of Mobile v. the Board of Revenue and Road Commissioners of Mobile County, 180 Ala. 513, 61 So. 814; Biennial Report of Attorney General, 1928-30, pages 763 and 789; Biennial Report of Attorney General, 1930-32, pages 24 and 899; Biennial Report of Attorney General, 1932-34, pages 130 and 632; Biennial Report of Attorney General, 1936-38, page 349; Quarterly Report of Attorney General, Vol. 1, pages 73 and 96; Quarterly Report of Attorney General, Vol. 2, page 222; Quarterly Report of Attorney General, Vol. 18, page 161; Quarterly Report of Attorney General, Vol. 50, page 204. Section 118, *supra*, reads as follows:

"§ 118. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

However, where a claim or fee that is fixed by law is made certain, such claims do not have to be presented to the Board of Revenue to be audited, examined and allowed and is not barred by the one year statute of nonclaims (Section 118, *supra*). Quarterly Report of Attorney General, Vol. 14, pages 123 and 331; **State ex rel Goldsmith**, 17 Ala. App. 170, 82 So. 660; **State ex rel City of Mobile v. Board of Revenue and Road Commissioners of Mobile County**, *supra*; Quarterly Report of Attorney General, Vol. 4, page 25.

Where special laws provide for a different mode of dealing with the claim, presentment to the county board is not required. **Dale County v. Gunter**, 46 Ala. 118; **Board of Revenue of Montgomery County v. Southern Bell Tele. Co.**, 200 Ala. 532, 76 So. 858.

Even though a claim against a county may be barred for failure to present it to be audited and allowed within one year as required by Section 118, *supra*, this office has held under the authority of Title 12, Section 110, Code of Alabama 1940, that where the county has actually received services, money or property the claim may be allowed and paid at the discretion of the county governing body. Quarterly Report of Attorney General, Vol. 10, page 133; Quarterly Report of Attorney General, Vol. 14, pages 131, 142, 144 and 304; Quarterly Report of Attorney General, Vol. 18, page 81; Quarterly Report of Attorney General, Vol. 19, page 299; Quarterly Report of Attorney General, Vol. 22, page 194; Quarterly Report of Attorney General, Vol. 26, page 134; Quarterly Report of Attorney General, Vol. 55, page 51. Section 110, *supra*, reads as follows:

"§ 110. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought

county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims, on account of a defect in any law or any other reason."

Claims which have been audited and allowed by the Board of Revenue or other body of like jurisdiction in compliance with Section 118, *supra*, become a fixed or prima facie liability against the county (*Jefferson Publishing Co. v. Hilliard*, 105 Ala. 576) and are not affected by the one year limitation of Section 118, *supra*. Quarterly Report of Attorney General, Vol. 15, page 62.

A claim arising upon a stated or liquidated account which has been audited and allowed by the county governing body, but not paid for over six years could be barred by the six year statute of limitations set forth in Title 7, Section 21, Code of Alabama 1940. However, the statute of limitations is a defense which may or may not be resorted to. *Broadus v. Lindsey*, 17 Ala. App. 342, 84 So. 776. It is not jurisdictional. The fact that the statute of limitations has run on the account in question would be a bar to the payment of such account if such defense was desired, but it would have no effect on the authority of the board to pay the same if it desired in its discretion to reimburse the claimant under the authority of Section 110, *supra*. Quarterly Report of Attorney General, Vol. 18, page 81; Quarterly Report of Attorney General, Vol. 22, page 234; Quarterly Report of Attorney General, Vol. 14, page 275.

A claim which has been presented to the county governing body and disallowed by that body and which is now barred by the three or six year statute of limitations may not be paid as an equitable claim under Section 110, *supra*. Quarterly Report of Attorney General, Vol. 27, page 41. In *Rice v. Tuscaloosa County*, 242 Ala. 62, 4 So. 2d 497, in speaking of Section 186, Code of Alabama 1923, now Section 110, *supra*, the Supreme Court said:

"(5, 6) Section 186 is not a mandate to the county governing body; on the other hand, it confers a discretionary authority to make payment of certain equitable and moral claims against a county. *Escambia County v. Dixie Chemical Products Co.*, 229 Ala. 287, 156 So. 631. Its field of operation ceased when the board of revenue denied appellant's claim."

You will note that by Title 7, Section 96, Code of Alabama 1940, that if a claim has been presented to the county governing body and that body failed or refused to enter upon its minutes the disallowances or

reduction of the claim for ninety days, then that failure to act shall constitute a disallowance of the claim. Section 96 of Title 7, *supra*, reads as follows:

"§ 96. Suit against county. Suit must not be brought against a county until the claim has been presented to the court of county commissioners or other similar governing body, and disallowed or reduced by the court, and the reduction refused by the claimant. The failure or refusal of such court or other similar governing body, to enter upon its minutes the disallowance or reduction of the claim for ninety days is a disallowance. Proof of the fact of presentation of such claim to such court of county commissioners or other similar governing body may be made by parol evidence."

Therefore, if a claim be presented within twelve months and no action taken on the same for six years, such claim would be barred by the six year statute of limitations and could not be paid under the equitable claims statute (Section 110, *supra*). Biennial Report of Attorney General, 1934-36, page 138; Quarterly Report of Attorney General, Vol. 52, page 208. That part of the opinion appearing in Quarterly Report of Attorney General, Vol. 14, page 275, in conflict with the above, is hereby overruled.

A board of revenue or like governing body has authority to reconsider and allow a claim which they have previously disallowed, provided that at the time of reconsideration the claim has not been barred by the statute of limitations. Quarterly Report of Attorney General, Vol. 14, page 296; 14 Am. Jur. page 232; *Fountain v. State*, 210 Ala. 51, 97 So. 59; *Crumly v. Henry County Treas.*, 221 Ala. 526, 129 So. 266; *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196.

It is my understanding from the facts set forth in your request that this claim originates out of statements that were presented to the Board of Revenue in 1940, 1941 and 1942, and that no action was taken by the Board. If this be true, then because of failure to act, the claim was automatically disallowed at the expiration of ninety days after presentment (Section 96, *supra*), and cannot now be paid under the equitable claims statute (Section 110, *supra*) for the reason set forth above. This conclusion makes it unnecessary to consider the question of interest.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 6, 1950.

Hon. C. H. Keller,
Register, Circuit Court,
Cullman County,
Cullman, Alabama.

Bonds—Costs and Fees—Guardian and Ward.

Sureties on guardian's bond not liable for court costs where suit is brought by guardian in good faith.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of November 8, 1949, is as follows:

"I would appreciate it if you would give me an opinion on the following question as soon as possible.

"In a suit filed in the Circuit Court in Equity whereby the complainant is designated in the original bill as 'J. A. Ashley as Guardian of Mary Lou Ashley, non compos mentis, complainant, vs. Grover C. Ashley, as admr., et al., respondents,' and complainant amends his complaint to read as follows, 'J. A. Ashley as guardian of Mary Lou Ashley, non compos mentis, and Mary Lou Ashley, non compos mentis, who sues by J. A. Ashley, her legal guardian, appointed under the laws of the State of Alabama, complainant, vs. Grover C. Ashley, as admr., etc., et al, respondents,' and upon final hearing of the case in Circuit Court is dismissed by the Circuit Court, 'at the cost of the complainants'; in a case such as this would the sureties on the guardian's bond be liable for court cost under the guardian bond executed by J. A. Ashley, as legal guardian of Mary Lou Ashley, non compos mentis?

"I am enclosing a copy of the guardian's bond referred to. It is my understanding that the Attorney General held in a previous opinion that where a suit is brought by the next friend of an infant or incompetent or where suit is brought by the legal guardian of an infant or incompetent that such person is liable for court cost in his individual capacity as well as in his representative capacity as such guardian, in a case where the complainant fails in his suit and the cost is taxed against the complainant or the petitioner. Also advise if execution would lie against sureties on the guardian's bond, copy of which is hereto attached, in case execution is returned 'no property found' by the Sheriff against the complainant individually."

The guardian's bond which you attach to your inquiry is conditioned that the guardian "shall well and truly perform all the duties which are or may be, by law, required of him as such guardian."

In the case of *Savage v. Dickson*, 16 Ala. 256, the court said:

"It is certainly the duty of a guardian not only to defend, but also to bring such suits as are necessary for the protection of the rights and interests of his ward. If the guardian have (sic) a just pretense or reasonable ground for bringing the suit, the costs must be borne by the minor, unless the guardian has conducted himself improperly in the management of the suit and thereby swelled the amount of the costs to an unreasonable extent."

In my opinion, if the guardian mentioned in your inquiry brought his suit in good faith, he "well and truly" performed his duties and the sureties on his bond would not be liable for the costs of the suit. If the suit was not brought in good faith, then the guardian would not have performed his duties and the sureties would be liable.

In Quarterly Report of Attorney General, Vol. 43, page 33, the opinion mentioned in your inquiry, it was held that a guardian was liable personally for the cost of the suit if the ward had no property out of which to pay them. The above mentioned opinion does not state that the guardian is liable in his representative capacity and hence is not in conflict with the views reached herein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 6, 1950.

Hon. Julian Swift,
Clerk Circuit Court,
Jefferson County,
Birmingham 3, Alabama.

Clerks of Circuit Courts—Jefferson County—Costs and Fees.

The clerk of the Circuit Court of Jefferson County has a cause of action against a successful defendant in a civil case for those fees incurred at the instance of the successful defendant and to which the clerk is entitled, even though costs have been taxed against the unsuccessful plaintiff, and execution has issued against said plaintiff under the provisions of Section 3, of Act No. 536, Local Acts 1947, page 359.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 24, 1949, is as follows:

"A 1947 local act of Alabama, pages 359-363, requires the Clerk of the Circuit Court of Jefferson County to issue execution for fees owing to the Clerk for the use of Jefferson County upon said fees becoming delinquent under Section I of said act.

"The aforesaid act gives the Collecting Agent of Jefferson County several remedies for collection of fees owing to the Clerk for use of Jefferson County that the Sheriff does not have.

"Prior to the passage of aforesaid act an execution returned by the Sheriff apparently created a presumption that the unsuccessful party could not be made to pay.

"I will appreciate your opinion as to the following questions: First, Can the Clerk of the Circuit Court legally proceed through demand and suit against a successful defendant for collection of fees owing to said Clerk for the use of Jefferson County during the pendency of an execution issued against the plaintiff under 1947 local acts of Alabama pages 359-363? Bearing in mind that fees created by the defendant are included in the execution issued to the County Collection Agent against the plaintiff and which execution has not been returned "No Property Found."

In my opinion, the clerk of the circuit court may legally proceed through demand and suit against a successful defendant for collection of fees owing to said clerk (for the use of Jefferson County) during the pendency of an execution issued against the plaintiff under Act No. 536, Local Acts 1947, page 359.

Since your question is asked in general terms, I shall assume that the following facts represent the question stated in your inquiry:

A plaintiff sues a defendant in the Circuit Court of Jefferson County. At the conclusion of the action, the plaintiff is unsuccessful, and the defendant is successful. A final judgment is rendered, including a recital that plaintiff is taxed with all the costs, and execution is ordered to issue against plaintiff for said costs. Title 11, Section 65, Code of Alabama 1940. Costs are not paid by the plaintiff, and execution for all costs then issues against the plaintiff in accordance with the judgment. The return on this execution, when levied by the sheriff, is no property found, or that the property is insufficient to pay the costs, and the judgment for costs remains unsatisfied.

At this point, Act No. 536, Local Acts 1947, page 359 becomes operative. This Act provides a method for the collection of "delinquent court costs and fees" in Jefferson County. Section 1 of said Local Act, supra, defines the delinquent court costs and fees that may be collected according to the terms of Act No. 536, supra. "Delinquent court costs and fees" which may be so collected are costs which "have been taxed against the plaintiff . . . and execution therefor returned unsatisfied in whole or in part, or where costs have been taxed against the defendant . . . and execution returned 'no property found' and thereafter a like return made

on execution issued against the plaintiff . . . for costs created by the plaintiff . . .” and which unpaid costs would be required by law to be paid into the county treasury.

When all of the events have occurred which make the costs “delinquent court costs” within the meaning of Section 1 of Act No. 536, supra, the clerk is required to issue an execution for the delinquent court costs, and direct the execution to the license inspector. Section 3 of Act No. 536, supra. By the terms of the Local Acts, supra, the license inspector is given several remedies, including garnishment for collecting that part of the costs, which are, by the terms of the Local Act, supra, defined to be “delinquent court costs.” We are not here concerned with those additional methods for collection granted to the license inspector by the terms of Act No. 536, supra. According to the facts in your inquiry, you desire to know whether or not you may sue the successful defendant for the costs created by such successful defendant, even though the license inspector holds an execution for such costs, which has been issued under the provisions of Section 3 of Act No. 536, supra, as described above.

In my opinion, the clerk could maintain an action against the successful defendant for the recovery of fees for services which the clerk has performed for the successful defendant, even though an execution has issued as provided for in the Local Act, supra.

It has been held that even though a statute authorizes a judgment to be rendered in favor of the successful party for costs, this statutory provision is no bar to the maintenance of a suit by the officer against a successful party to recover those fees incurred at the instance of or created by the successful party. See Title 11, Section 65, Code of Alabama 1940; *Southern and Northern Alabama Railway Co. v. Bradley*, 84 Ala. 468; *Danforth v. McClellan*, 196 Ala. 567, 72 So. 104.

In the *Bradley* case, supra, the plaintiff was unsuccessful in several actions against the defendant. During the litigation, defendant had requested the clerk of the court to issue several subpoenas for defendant's witnesses, and for such services the clerk, Bradley, was entitled to a legal fee. Even though the plaintiff failed, and even though the statute provided for the taxation of all costs against the plaintiff, it was held that the clerk could sue the defendant in an action of debt or indebitatus assumpsit in order to recover the fees for issuing defendant's subpoenas, and that the statute authorizing costs to be taxed and collected against the plaintiff was no bar to the action for debt by the clerk against the successful defendant.

In the *Danforth* case above cited, it is stated:

“The judgment in favor of a party for costs does not relieve him from liability to the officers or the witnesses for their fees, though a judgment has gone against the other party for costs which includes such fees.”

In the case outlined by your inquiry, the fees to which the clerk is entitled have not been paid. The Local Act, *supra*, so far as the clerk is concerned, merely authorizes the issuance of another execution in addition to that which has already been issued to the sheriff. The pendency of such an execution, in my opinion, does not relieve the successful defendant of the debt owed by him to the clerk by reason of the fact that he has requested the clerk, or impliedly requested the clerk, to perform certain services for him, and for which there is an implied promise to pay. As long as the costs remain unpaid, it is my opinion that the clerk can proceed by an action at law against the party creating those costs, and said clerk should obtain a judgment in the amount of the fees due to the clerk.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1950.

Hon. Abe C. Cook,
Clerk, Circuit Court,
Wilcox County,
Camden, Alabama.

Sheriffs—Costs and Fees — County Courts—Counties — Subpoenas—Justices of the Peace.

1. A sheriff is entitled to a fee of \$2.00 for each day's attendance upon the county court, which fee is chargeable against the county.

2. A fee for receiving a complaint and issuing a warrant of arrest is chargeable in the county court and in a justice of the peace court, even though defendant pleads guilty of the offense defined in Title 23 or Title 36, Code of Alabama 1940, and does not appeal.

3. A clerk of the circuit court is entitled to receive thirty cents for issuing a subpoena in a civil case and twenty-five cents in a criminal case. The fee includes making a copy of the subpoena.

4. A second copy of the subpoena is not required by law to be made and no fee can be charged therefor.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 8, 1949, is as follows:

"Your official opinion on the following questions is respectfully requested:

"(1) Title 11, Section 87, Code of Alabama 1940, recites, in part: 'the following fees shall be taxed: For each day's attendance by the sheriff, on such court, \$2.00.' Is that a fee to be charged against the defendant in each case tried in County Court, regardless of how many cases are tried in one day in said Court, or is it like a witness fee, to be charged against only one case of a certain day; if you find that it is a fee to be charged against each case, regardless of how many are heard in one day of Court, would each fee go to the County (we have no Fine and Forfeiture Fund), or would the Sheriff be entitled to each fee collected?

"(2) Title 11, Section 81, 1940 Code, does not waive that fee mentioned in Title 11, Section 87, that reads 'for taking affidavit of complaint and issuing warrant of arrest \$1.00' does it, whether that service is performed by the County Judge or a Justice of the Peace, either one?

"In this question, I am referring a person pleading guilty under title 11, Section 87, and the Judge fines \$5.00 and costs, without mentioning any specific waiver of costs by the Judge of the Court.

"(3) Title 11, Section 21, 1940 Code, allows, in part, 'making copy of any paper not herein provided for, for each one hundred words, \$.15.' When I issue a subpoena, in Civil or Criminal cases, I make it out in triplicate: the original for the person to be served, a duplicate for the Sheriff to enter his return upon and return to me and the triplicate as evidence of my having issued the subpoena. I feel that each one of these copies are necessary in the case, and think that I should be entitled to pay for making them, at the rate of \$.15 per hundred words, whether in Civil or Criminal cases. Am I correct? The only opinion relating to this subject that I can find is Attorney-General's opinion dated June 24, 1929."

1. You are advised, in answer to your inquiry number 1, that the sheriff is entitled to a fee of \$2.00 for each day that he attends county court. Title 11, Section 87, Code of Alabama 1940. The fee is not taxed against the defendant, but is paid by the county upon claim being to the county. Such fee cannot exceed \$2.00 per day. It is a per diem fee for attending court one day. Quarterly Report of Attorney General, Vol. 13, page 119, 120; Vol. 26, page 134.

2. In answer to your question number 2, you are advised that under the provisions of Title 11, Section 87, Code of Alabama 1940, a fee of \$1.00 is payable in the county court "for taking affidavit of complaint and issuing warrant of arrest." When this service is performed in a justice of the peace court, the fee is twenty-five cents for receiving a complaint and fifty cents for issuing a warrant of arrest. Title 11, Section 96, Code of Alabama 1940.

If the defendant pleads guilty and does not appeal after he has been charged with an offense defined in Title 23 or in Title 36, Code of Alabama 1940, the court is prohibited from charging or collecting certain fees enumerated in Title 11, Section 81, Code of Alabama 1940. However, Section 81, *supra*, does not prohibit either the county court or the justice of the peace court from taxing and collecting the fees referred to in your inquiry number 2, even though the defendant pleads guilty and does not appeal. Therefore, those fees may be taxed and collected even though Title 11, Section 81, *supra*, is applicable, for the reason that those fees are not specified in Section 81, *supra*.

3. In answer to your inquiry number 3, you are advised that the clerk of the circuit court is entitled to a fee of thirty cents for issuing a subpoena in a civil case and twenty-five cents for issuing a subpoena in a criminal case. Title 11, Sections 21, 89, Code of Alabama 1940. The fee allowed for issuing a subpoena includes both the original and the copy made by the clerk. Opinions of Attorney General, Office Edition, Vol. 18, page 161, rendered September 29, 1934. The opinion referred to in your inquiry rendered on June 24, 1929, and found in Biennial Report of Attorney General, 1928-1930, page 486, states that the clerk is entitled to a fee of fifteen cents per hundred words for making a copy of the subpoena. Our opinion of September 29, 1934, however, overrules this opinion, and states as follows:

"It is now clear to my mind that the original subpoena and the copy to be served constitutes one and only one subpoena, and the clerk can charge for only one. In other words, the original on which the sheriff makes his return and copy served on the witness, constitute but one subpoena."

You are advised, therefore, that for the original and one copy of the subpoena you are entitled to one fee, in civil cases thirty cents and in criminal cases twenty-five cents. Title 11, Sections 21, 89, Code of Alabama 1940. If you desire to make an additional copy, the law does not require it, and in my opinion you cannot charge and collect a fee for making additional copies.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1950.

Hon. Perry B. Hughes, Jr.
Clerk, Circuit Court,
Sixth Judicial Circuit,
Tuscaloosa County,
Tuscaloosa, Alabama.

Tuscaloosa County—Inferior Courts—Trial Tax—Witnesses—
Clerks of Inferior Courts—Clerks of Circuit Courts.

1. The trial tax in criminal cases in the Inferior Court of Tuscaloosa County is \$3.00.

2. Witness fees in the Inferior Court of Tuscaloosa County are fifty cents per day in those cases over which justices of the peace have jurisdiction, and seventy-five cents per day and five cents per mile in those cases over which justices of the peace do not have jurisdiction.

3. The clerk of the Inferior Court of Tuscaloosa County is required to deduct five percent from amounts collected and remitted to the State of Alabama, and pay said five percent into the county treasury.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 1, 1949, is as follows:

"For many years a trial tax of \$5.00 has been assessed and collected on criminal cases in the Inferior Court of Tuscaloosa County. In 1947 the Act creating the Court was amended and the provisions of the amendment are conflicting and I would appreciate very much if you would give me an official opinion to clarify this matter.

"Please refer to Act No. 214, Local Acts 1947, page 123, which amends Act No. 228, Local Acts 1927 and advise me on the following questions:

"(1) Is the legal trial tax to be collected on Criminal cases in the Inferior Court three or five dollars?

"(2) Under this amendment can a witness fee of 75c per diem and five cents per mile be paid each witness in each criminal case who proves his attendance as paid in the Circuit Court?

"(3) Under this amendment can I as Ex-officio Clerk of this Court, on a salary basis, deduct 5% commission on remittances made to the State for the use of Tuscaloosa County?

"State Examiners are now engaged in an audit of this office and an early reply is urgently requested."

I have referred to both of the acts cited in your inquiry. These are Act No. 228, Local Acts 1927, page 130, creating an inferior court of Tuscaloosa County, and Act No. 214, Local Acts 1947, page 123, amending Section 4 of the local act first referred to above.

1. In answer to your question number 1, it is my opinion that the legal trial tax to be collected in criminal cases in the Inferior Court of

Tuscaloosa County is \$3.00. The Local Act of 1927, *supra*, provides: "The trial tax in all criminal cases shall be \$3.00 in each case . . ." The Local Act of 1947, *supra*, provides: "The trial tax in each criminal case shall be \$3.00 . . ."

It seems to me that since the creation of the Inferior Court of Tuscaloosa County the trial tax has always been \$3.00. Cf. Quarterly Report of Attorney General, Vol. 2, page 305, 207. I find no provision of law in either of the acts referred to in your inquiry authorizing a trial tax of \$5.00.

2. In connection with witness fees, the Local Act of 1947, *supra*, provides in part as follows:

"It shall be the duty of said clerk to tax and collect . . . the same costs and fines and fees, commissions, percentages and allowances in criminal cases as are now allowed by law to be assessed, charged and collected in the justices of the peace courts in all criminal cases of which justices of the peace now have jurisdiction. In all other criminal cases the same costs and fines, and the same fees, commissions, percentages, and allowances for the services of . . . witnesses in said Court shall be assessed and collected as are now provided by law to be assessed and collected for such offenses in the County Court of Tuscaloosa County, Alabama. . . ."

In my opinion, the above quoted part of Act No. 214, *supra*, provides that witnesses who appear in criminal cases in the Inferior Court of Tuscaloosa County, and who testify in a criminal case of the type which a justice of the peace has jurisdiction, should receive the same fees and allowances as are allowed in justice of the peace courts. Therefore, in cases in the Inferior Court of Tuscaloosa County, which are of such a nature that a justice of the peace would have jurisdiction over some, the witness fee would be only fifty cents and not seventy-five cents per day. See Title 11, Section 112, Code of Alabama 1940. In other criminal cases (those offenses over which justices of the peace do not have jurisdiction), the witness should receive the same fee and allowance as he would receive in the county court; that is to say, seventy-five cents per day, and five cents per mile. Title 11, Section 103, Code of Alabama 1940; Biennial Report of Attorney General, 1918-1920, page 164.

3. It is expressly provided in Act No. 214, *supra*, "The clerk shall deduct for the use of the county five percent of any sum or sums collected for and remitted to the state." It is the duty of the clerk, therefore, to retain five percent of any money collected for the State of Alabama and remitted to the State of Alabama. Such five percent should be paid into the county treasury. The five percent which you are required to deduct and pay into the county treasury is not the same five percent provided for in Title 11, Section 22, Code of Alabama 1940. Title 11, Section 22, *supra*, allows clerks of the circuit courts of Alabama a five percent fee or allowance for collecting and remitting to the State of Alabama. We have held that inferior court clerks are not entitled to receive such a fee or allowance, and that only the circuit clerk is entitled to receive this

compensation. See Quarterly Report of Attorney General, Vol. 20, page 284. The five percent deduction authorized by Act No. 214, supra, is not a fee, allowance, or a percentage for the clerk, but is retained by the clerk directly for the use of the county. You are advised, therefore, that it is your duty to retain said five percent and remit it to the county treasury.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1950.

Hon. James A. Crane,
Register, Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County—Library Tax—Words and Phrases—Costs and Fees.

1. A proceeding for the collection of delinquent city taxes under the provisions of Title 37, Section 681, et seq., Code of Alabama 1940, is a suit in equity within the meaning of Section 2 of Act No. 248, Local Acts 1947, page 172, providing for the collection of a library fee in each suit in equity filed in the Circuit Court of Mobile County.

2. Section 6 of Act No. 248, Local Acts 1947, page 172, requires that the law library fee be deducted from costs in preference to all other items of cost and paid to the county treasurer.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 19, 1949, is as follows:

"Will you please give me your opinion as to whether a Library Fee should be taxed and collected in Delinquent City Tax Collection cases, under Local Act 1947, page 172, the title of which reads as follows: 'To authorize and provide for the establishment, maintenance, operation and financing of a Public Law Library in Mobile County, Alabama, * * * to provide for the taxing and collecting of additional court costs in certain Courts in said County for such purpose. * * *'

"Section 2 of said Act reads as follows: 'In order to provide a special fund for the maintenance of said Library, there shall be taxed as costs the sum of One dollar and fifty cents in each Suit in Equity

* * * hereinafter filed in the Circuit Court of Mobile County, Alabama * * * which costs shall be collected as other costs in such cases are collected * * *

"I would also like to have your opinion as to distribution of costs under Section 6 of said Act.

"I am enclosing a copy of a letter from Mr. Twitty in the hopes it might save you some work—I know you have enough without this—if this letter is sufficient, don't bother to write an opinion—just write O. K. on this letter and that is all I want."

In my opinion, the law library fee should be taxed and collected in delinquent city tax collection cases as provided in Section 2 of Act No. 248, Local Acts 1947, page 172. Act No. 248, *supra*, provides for the establishment of a Mobile County Law Library Fund. This fund consists of certain fees taxed and collected in the various courts of Mobile County. Among the courts required to assess and collect the fee is the Circuit Court of Mobile County. It is provided in Section 2 of Act No. 248, *supra*, that:

"In order to provide a special fund for the maintenance of said Library, there shall be taxed as costs the sum of One Dollar and Fifty Cents (\$1.50) in each Civil or Quasi Civil Action at Law, Suit in Equity, Criminal Case, Quasi Criminal Case, proceeding on a Forfeited Bail Bond or proceeding on a Forfeited Bond given in connection with an appeal from a judgment of connection with an appeal from a judgment of conviction in any Inferior or Municipal Court to the Circuit Court hereinafter filed in, arising in, or brought by appeal, certiorari or otherwise to the Circuit Court of Mobile County, Alabama, which costs shall be collected as other costs in such cases are collected by the Clerk of said Court or the Register in Chancery thereof, as the case may be, and shall be paid to the Treasurer of Mobile County, Alabama."

The question to be decided, therefore, is whether or not a proceeding for the collection of delinquent city taxes is a "suit in equity" in the circuit court within the meaning of Section 2 of Act No. 248, *supra*.

In my opinion, the filing of proceedings in the Chancery Court of Mobile for the collection of delinquent city taxes is a suit in equity within the meaning of Section 2, *supra*. Title 37, Section 681, Code of Alabama 1940, provides that the lists of delinquent taxpayers, after being certified and containing a description of the property taxed, shall be filed with the register of the circuit court. After this list is filed, Title 37, Section 681, Code of Alabama 1940, requires the register to docket a cause for each assessment. I conclude from this statute (Title 37, Section 681, *supra*) that the register is required to docket each tax case separately in a particular book which is a docket separate and apart from the trial docket or regular docket of the equity court. Title 37, Section 681, *supra*, further requires that a summons be issued as in chancery cases,

notifying the owner of the filing of the proceedings against his property. The summons is required to be executed by the sheriff and a return is made to the register.

The defendant in such proceedings has a right to plead a defense. Title 37, Section 683, Code of Alabama 1940. The equity court then renders a decree for the sale of the property. Title 37, Section 683, Code of Alabama 1940. The decree of the court may include the costs and expenses of such cause. Title 37, Section 683, Code of Alabama 1940. It is my opinion that the proceedings described above amount to a suit in equity within the meaning of Act No. 248, supra, requiring the taxing and collecting of a law library fee. You are advised, therefore, that said fee should be taxed and collected in delinquent city tax cases.

In answer to your second inquiry concerning the distribution of costs under Section 6 of Act No. 248, supra, it is my opinion that Section 6 merely requires that the law library fee be paid over to the treasurer in preference to the distribution of costs to other officers of the court, or before officers' fees or other costs are paid into the county treasury. In other words, Section 6 requires that when any of the costs are paid, even though those costs are not entirely sufficient to pay all of the costs, the law library fee must be deducted first and paid to the county treasurer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1950.

Hon. A. A. Pate,
Sheriff,
Calhoun County,
Anniston, Alabama.

Sheriffs—Juveniles.

1. When a sheriff is ordered by a Juvenile Court to transport a juvenile to a State Institution, it is his duty to so transport such juvenile.

2. The fact that employees of the State Welfare Department also transport juveniles to State Institutions, would not relieve the sheriff of this duty.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 23, 1949, is as follows:

"Please give me your opinion on the following question:

"In Calhoun County we have a Welfare Department with funds set up to take care of transportation of Juveniles to Industrial Schools, at the rate of six cents per mile. For the same trip, the Sheriff is only paid at the rate of five cents per mile. Under these circumstances, is the sheriff required to transport these Juveniles and have the expenses charged out of the Sheriff's allotment?"

My answer to your inquiry is in the affirmative.

Title 13, Section 351, Code of Alabama 1940, provides in part, as follows:

"§ 351. Courts having jurisdiction of children.— * * * * The juvenile court shall have power, under the terms of this chapter, to determine the question of the dependency, neglect or delinquency of any child, and when such question is so determined and adjudicated, to make and enter such judgment and orders for his custody, discipline, supervision, care, protection and guardianship, as, in the judgment of the court will properly conserve and protect the welfare and best interests of such child. * * * *"

It plainly appears from the above that the juvenile courts of this State have authority to make whatever lawful orders they see fit in regard to juveniles. If the judge of such court ordered you, as sheriff, to transport a juvenile to a state institution, it would be your duty to comply with this order.

The six cents per mile referred to in your request, which is paid to agents of the Welfare Department for transporting said juveniles, is provided for by Act No. 425, General Acts of 1949, page 607, which said act provides that any employee of the State of Alabama or any of its agents when using their private automobile on State business shall be compensated six cents per mile for the use of such automobile. This act has no application whatsoever to the several sheriffs of the State of Alabama.

You are, therefore, advised that the fact that some other person other than you, as sheriff, sometimes transport juveniles to state institutions, would not relieve you of this responsibility if you were ordered to do so by the judge of the juvenile court under the provisions of Section 351, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 8, 1950.

Hon. Ernest Graham,
Member Board of Registrars,
Lawrence County,
Courtland, Alabama.

Board of Registrars—Elections—Intoxicating Liquors.

A qualified elector convicted of the offense of distilling should be purged from the list of qualified electors.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 10, 1950, is as follows:

"As a Member of the Board of Registrars and at the request of the other two members of the Board of Registrars of Lawrence County, will you please give us an opinion in regard to the following:

"Should we, as members of the Board of Registrars purge a man from the list of qualified voters who has been convicted and is or has served a prison sentence for distilling liquor?"

Section 182, Constitution of Alabama 1901, defines those persons who are disqualified from voting. Among others, are those convicted of ". . . any crime punishable by imprisonment in the penitentiary . . ."

Title 29, Section 103, Code of Alabama 1940, makes distilling a criminal offense and sets punishment at imprisonment at hard labor in the penitentiary for not less than one year nor more than five.

The premises considered, it is my opinion that a person who has been convicted of distilling should be purged from the list of qualified voters. See also Quarterly Report of Attorney General, Volume 17, page 197.

You are further advised that the disqualification does not attach until the judgment of conviction has become final. Quarterly Report of Attorney General, Volume 18, page 120.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 9, 1950.

Hon. Marshall J. Williams,
Sheriff,
Barbour County,
Clayton, Alabama.

Sheriffs—Costs and Fees.

Sheriff is not entitled to fee as provided by Act No. 573, General Acts 1943, page 576 (1947 Cumulative Pocket Part, Code of Alabama 1940), for attending terms of county court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 31, 1950, is as follows:

"Please advise me whether or not I am entitled to compensation for attending terms of the county court under the provisions of Title 11, Section 100(3) of the 1940 Code as amended on July 7, 1943 (1943 Acts p. 576)."

It is my opinion that you are not entitled to compensation for attending terms of the county court under Act No. 573, General Acts 1943, page 576 (1947 Cumulative Pocket Part, Code of Alabama 1940), Title 11, Section 100, Subsection 3, Code of Alabama 1940. This act has been construed as applicable only for attendance on the circuit and probate courts. The sole purpose of this act was to allow sheriffs the same fees for attending non-jury civil courts as were allowed them for attending civil jury courts, and the same fees for attending jury and non-jury criminal courts as were paid them for attending civil jury terms of the circuit courts. Quarterly Report of Attorney General, Vol. 34, page 38.

Your attention, however, is called to Title 11, Section 87, Code of Alabama 1940, the pertinent portion of which reads:

"In prosecutions before the county court the following fees shall be allowed for the services specified:

" * * * * *

"For each day's attendance by the sheriff, on such court___ \$2.00

" * * * * *"

See, also, Quarterly Report of Attorney General, Vol. 30, page 39.

You are, therefore, entitled to two dollars per diem for attendance on the county court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 10, 1950.

Hon. Creel Richardson,
Superintendent,
Dale County Board of Education,
Ozark, Alabama.

County Superintendents of Education—Elections—Dale County—Officers and Offices—Statutes.

The candidate elected, at the next general election in November, 1950, as County Superintendent of Education for Dale County, will be elected to fill a vacancy consisting of an unexpired 2-year short term beginning on July 1, 1951, and ending on July 1, 1953.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of February 1, 1950, is as follows:

"In November, 1948, Mr. J. H. Johnson was elected to the office of County Superintendent of Education for the four-year term, beginning July 1, 1949. On July 1, 1949, Mr. Johnson assumed his duties as County Superintendent of Education. About two weeks later he died and I was appointed by the Dale County Board of Education to the office of County Superintendent of Education. My term as an appointee, as I understand it, extends to July 1, 1951.

"As a result of a local law, there must be an election by the people of the County Superintendent of Education in November, 1950. We would like an opinion from your office on this question. Will the person elected by the people in November, 1950, serve only for the remainder of Mr. Johnson's unexpired term, beginning July 1, 1951, or will this person serve for a full four-year term, beginning July 1, 1951?"

I am of the opinion that your successor, who will be elected by the people during the coming November, 1950, general elections, will be elected to serve only for the remainder of Mr. J. H. Johnson's unexpired term, to wit, for the period of July 1, 1951, to July 1, 1953.

The local law to which you refer is Act No. 127, Local Acts 1927, page 52, Section 2 of which substantially provides that a County Superintendent of Education for Dale County shall be elected during November, 1928, shall assume the duties of his office on July 1, 1929, shall hold office for a term of four years, and that such a superintendent shall be elected for each four year term thereafter.

Section 5 of Act No. 127, *supra*, provides in part that, should a vacancy occur in the said office, such vacancy shall be filled by appointment

made by the County Board of Education, the appointee to hold office until the next general election following his appointment.

By fitting into the framework of the statute the facts supplied in your request, it is seen that Mr. J. H. Johnson was elected during November, 1948, for a 4-year-term starting on July 1, 1949, and ending on July 1, 1953. Subsequent to his death you were appointed, by the County Board of Education, to serve only until displaced by some person, duly elected at the next general election to fill out the remainder of Mr. Johnson's unexpired term. Since such election will be held during November, 1950, and since, by virtue of Act No. 569, General Acts 1943, page 573 (codified as Title 52, Section 107(1), Cumulative Pocket Part, Code of Alabama 1940), the successful candidate shall take office on the July 1 following the date of his election, the person elected to fill Mr. Johnson's unexpired term will hold the office from July 1, 1951 until July 1, 1953. In turn, that person's successor will stand for election in November, 1952, and will be elected to a full 4-year term beginning on July 1, 1953, and ending on July 1, 1957.

The foregoing conclusions follow from the express language of Sections 2 and 5, *supra*, the plain import of which, when construed *in pari materia*, is that the candidate elected in November, 1950, is elected for the short unexpired term, and not for the full term. The schedule of election years covering this office was fixed by Section 2, *supra*, which schedule runs 1928, 1932, 1936, 1940, 1944, 1948, 1952, etc. A different construction placed upon Section 5, *supra*, would force that section into conflict with Section 2, *supra*, and would operate to alter the schedule fixed by the act creating the office.

It is a cardinal principle of statutory construction that a statute must be construed as a whole, and that the separate section thereof should be construed so as to avoid a conflict and give each due effect, if that can be done without doing violence to the letter of either and according to its plain language and intent. *Vick v. Bishop*, (Ala.), 40 So. 2d 845; *Ex parte Miles*, 248 Ala. 386, 27 So. 2d 777; *Mutual Life Ins. Co. of New York v. Allen*, 166 Ala. 159, 51 So. 877; 2 *Sutherland on Statutory Construction*, Section 4703, page 336 et seq. (3rd edition—1943).

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 13, 1950

Hon. C. W. Hewett,
Mayor, Town of Arab,
Marshall County,
Arab, Alabama.

Municipalities—Insurance.

1. A municipal corporation is not liable for injuries resulting from the negligent operation of motor vehicles of the police department and fire department, and municipal funds may not be legally expended to pay premiums on liability insurance on motor vehicles operated by said departments.

2. A municipal corporation is liable for injuries resulting from the negligent operation of motor vehicles of the street and electric light and water departments, and municipal funds may be legally expended to pay premiums on liability insurance on motor vehicles operated by said departments.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 14, 1949, is as follows:

"The Town Council of the Town of Arab has instructed me to respectfully request a written opinion from your office concerning the legality of the payment of public funds to cover insurance premiums on municipally owned and municipally operated motor vehicles. A question has arisen as to the Town of Arab's liability in the operation of motor vehicles in its several departments, namely:

- "1. Police Department
2. Fire Department
3. Street Department
4. Electric Light and
Water Department

"Is the payment of an insurance premium covering liability for accidents and property damage a legal expenditure of public funds by any of the four departments referred to above?

"Heretofore we have carried such insurance on all departments and paid the premiums from public funds. But we have been informed that there is a question as to the validity of the expenditure of public funds to pay insurance premiums covering liability for accidents and property damage for the municipally owned and municipally operated motor vehicles.

pally operated police and fire motor vehicles. We would deeply appreciate an opinion from your office concerning this entire matter."

It is a well-established principle of law that a municipal corporation is not liable for the torts of its officers, agents, and employees when engaged in the performance of its governmental functions. However, it is an equally well-established principle of law that a municipal corporation is liable for the torts of its officers, agents, and employees when engaged in the performance of its corporate or ministerial functions. 38 Am. Jur., Corporations, Section 578; *Densmore v. City of Birmingham*, 223 Ala. 210, 135 So. 320; *McSheridan v. City of Talladega*, 243 Ala. 162, 8 So. 2d 831; *City of Montgomery v. Quinn*, 246 Ala. 154, 19 So. 2d 529.

In the *Densmore* case, *supra*, the court stated:

"We are well committed to the principle in Alabama that a municipal corporation is liable for injuries caused by the wrongful or negligent performance of its corporate or ministerial duties. *City of Anniston v. Hillman*, 220 Ala. 505, 126 So. 169; *City of Bessemer v. Barnett*, 212 Ala. 202, 102 So. 23; *City of Selma v. Perkins*, 68 Ala. 148; *Smoot v. Mayor, etc., of Wetumpka*, 24 Ala. 112; *City of Bessemer v. Whaley*, 187 Ala. 525, 65 So. 542.

"We are just as well committed to the further principle that it is not liable for injuries caused by the wrongful or negligent performance of its governmental functions. *Williams v. Birmingham*, 219 Ala. 19, 121 So. 14; *City of Tuscaloosa v. Fitts*, 209 Ala. 635, 96 So. 771; *Kirk v. McTyerie*, 209 Ala. 125, 95 So. 361."

To answer your inquiry, it must be determined whether or not a municipal corporation, in the operation of the motor vehicles in the several departments set out in your inquiry, is engaged in the performance of a governmental or a corporation function.

A municipal corporation, in establishing and maintaining a police department, is acting in a governmental capacity. 43 C. J., *Municipal Corporations*, Section 1745; *Ratliff v. City of Bessemer*, 17 Ala. App. 632, 88 So. 208.

"The power to organize and maintain a fire department for the prevention of damage by fire is a public or governmental function * * *." 43 C. J. *Municipal Corporations*, Section 1746; *Hillman v. City of Anniston*, 214 Ala. 522, 108 So. 539; *Long v. City of Birmingham*, 161 Ala. 427, 49 So. 881.

A municipal corporation is not liable for injuries resulting from the negligent maintenance and operation of vehicles used by the police department. 43 C. J., *Municipal Corporations*, Section 1932.

A municipality is not liable for injuries resulting from the negligence of firemen operating vehicles used by the fire department. 43 C. J., *Municipal Corporations*, Section 1746.

In view of the fact that a municipal corporation is not liable for injuries resulting from the negligent operation of motor vehicles of the police department and fire department, it is my opinion that funds of the municipality may not be legally expended to pay premiums on liability insurance on the vehicles operated by said departments.

A municipality, in the performance of its duties with regard to public streets, is exercising corporate rather than governmental functions, and is liable for injuries caused by the negligence of its officers, agents, and employees when performing such duties. 43 C. J., Municipal Corporations, Section 1755; *Hillman v. City of Anniston*, supra; *City of Bessemer v. Barnett*, 212 Ala. 202, 102 So. 23.

It is therefore my opinion that funds of a municipal corporation may be legally expended to pay the premium on liability insurance on motor vehicles used in the construction, repair, and maintenance of its streets.

A municipal corporation engaged in the business of furnishing electricity, lights, and water is exercising corporate rather than governmental functions, and is liable for injuries caused by the negligence of its officers, agents and employees. *Town of Athens v. Miller*, 190 Ala. 82, 66 So. 702.

In the case of *Montgomery v. City of Athens*, 229 Ala. 149, 155 So. 551, the court said:

"It is further established in this jurisdiction that a city or town engaging in the business of furnishing electric lights, water, etc., is not in the exercise of governmental powers or functions, but of proprietary or business powers, and it is governed by the same rules of law applicable to persons or ordinary business corporations engaged in a like business. *Town of Athens v. Miller*, 190 Ala. 82, 66 So. 702; *City of Birmingham v. Whitworth*, 218 Ala. 603, 119 So. 841. See, also, 19 R. C. L. p. 691 et seq., § 4; pp. 696, 697, §§ 8 and 9."

See also 43 C. J., Municipal Corporations, Sections 1948, 1950; *Darby v. Union Springs*, 173 Ala. 709, 55 So. 889.

In view of the fact that a municipal corporation is liable for injuries resulting from the negligent operation of motor vehicles used in the electric light and water departments of the municipality, it is my opinion that it may legally expend funds to pay premiums on liability insurance on the motor vehicles operated by said departments.

In this connection, your attention is called to the Alabama League of Municipalities Municipal Information Bulletin, 1948-49 Series—No. 13, pp. 6 and 7, and 1949-50 Series—No. 2, pp. 7 and 8, which I think will be of interest to you.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 13, 1950.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Taxation—Filing Tax.

The determination of the amount of filing tax to be paid upon an instrument presented for recordation is left to the probate judge, and he may decide what facts constitute satisfactory evidence of the value of the property interest conveyed by such instrument.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of October 31, 1949, is as follows:

"Lerner Shops of Alabama, Inc. has submitted to me for recording a 'Short Form Lease' which is to be filed instead of the original lease which is lengthy. The short form lease is a synopsis of the original lease but the amount of rental is not stated. The lease, I understand, is for twenty-three years and four months and Ball & Ball, the attorneys submitting the lease for Lerner Shops of Alabama, Inc., have stated to us what the actual rental is under the terms of the original lease and have offered to pay the fees based on the amount of the rental which is not stated in the short form offered. The attorneys will furnish an affidavit to the effect that the lease was prepared by them and the rental provided in the lease is the amount which the attorneys have stated to us orally, and they refuse to have said affidavit recorded in this office.

"We would like to have your opinion at your earliest convenience whether I may accept this short form lease for recording with the affidavit of the attorneys presenting the lease, with the understanding, however, that the affidavit would not be recorded, but would simply be placed in the files in my office. We have no special file and this affidavit may or may not be available at the time of examination of this office next year.

"We contend that the lease should state the annual rental, so that this office can figure the deed tax due on said instrument. We also contend that a lease is quite different from a deed as we have the assessment in the tax assessor's office to guide us.

"The attorneys, Ball & Ball, want the amount of annual rental concealed and refuse to allow the suggested affidavit that they propose to make to be recorded.

"We find no law that requires us to accept for recordation a synopsis of lease which conceals the annual rental and ask your opinion if we should or should not accept same."

Title 51, Section 618, Code of Alabama 1940, leaves to the probate judge the matter of determining the amount of tax due on an instrument presented for recordation. *Long v. Jasper Land Company*, 217 Ala. 593, 117 So. 210, is clear on the proposition that it is up to the probate judge to satisfy himself as to the value of the property conveyed by the instrument sought to be recorded. The probate judge must determine what kind of evidence satisfies him as to the value of the property interest.

It is true that recited consideration in a deed or in an instrument conveying a property interest is prima facie evidence of the market value of the property or property interest conveyed. See: Quarterly Report of Attorney General, Vol. 14, page 139; Quarterly Report of Attorney General, Vol. 17, page 265. But, as stated above, the probate judge may resort to any other evidence of value. The key question is the reasonable satisfaction of the probate judge. Cf. Quarterly Report of Attorney General, Vol. 55, page 54.

It is unnecessary to point out that when an instrument is filed for record pursuant to Section 618, supra, the probate judge must certify on the instrument the amount of the tax paid.

The question is, therefore, one for your determination upon the basis of the evidence before you.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 13, 1950.

Hon. G. B. Pittman,
Tax Assessor,
Russell County,
Phenix City, Alabama.

Taxation—Exemptions.

Under the provisions of Section 91, Constitution of Alabama 1901, as well as Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts of 1947, page 491, all property, real and personal, used exclusively for purposes purely charitable is exempt from ad valorem taxation.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1949, is as follows:

"We have an assessment of real property recently purchased by a corporation, organized and incorporated under date of January 23, 1930, by authority of section 7167, Code of 1923; now Title 10, Sections 124, *supra*, Code of 1940.

"The property is to be used strictly for nonprofit activities as a home for aged members of the association.

"You are requested to advise me as to the liability for Ad Valorem Taxes on this property, or to be more specific; is this property exempt?"

In my opinion, your inquiry should be answered in the affirmative.

Although there is no specific authority of law exempting from ad valorem taxation the property of associations similar to that mentioned in your inquiry as such, it is provided by Section 91, Constitution of Alabama 1901, that:

"The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

It has been further held by the Supreme Court of Alabama that the above constitutional provision is not so expressed as to show a purpose to prohibit the Legislature from granting other exemptions to religious, educational and charitable institutions. *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527.

Pursuant to such authority, the Legislature has provided within Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts of 1947, page 491, that the following property shall be exempt from ad valorem taxation:

"* * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes; * * *"

The Supreme Court in construing this provision has held that the use of the property and not the ownership or application of the income derived from such property is the criterion to be used in determining whether such property is exempt by reason of use for charitable purposes. *State v. Alabama Educational Foundation*, supra; *Gay et al v. State*, 228 Ala. 253, 153 So. 767; *State et al v. Church of Advent*, 208 Ala. 632, 95 So. 3; *Anniston City Land Co. v. State*, 160 Ala. 253, 48 So. 659; see also Quarterly Report of Attorney General, Volume 14, page 96, and authorities therein cited.

From the facts presented by your request for opinion, it appears that the property here in question is used exclusively for charitable purposes, and such being the case, it is my opinion that such property is exempt from ad valorem taxation, not by virtue of the fact that it is the property of any particular association or type of association, but by reason of the charitable use of such property.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 13, 1950.

Hon. Ralph P. Eagerton, Chief Examiner,
Department of Examiners of Public Accounts,
State of Alabama,
CAPITOL.

Limestone County—Schools—County Superintendents of Education—County Boards of Education.

1. Act No. 194, Acts of Alabama 1949, page 225, providing increase in salary for county superintendent of education inoperative as to incumbent, as such increase would violate the Constitution of Alabama 1901, Section 281.

2. Act No. 195, Acts of Alabama 1949, page 227, providing increased compensation for members of county board of education allows immediate increase in compensation of present members, due to additional duties imposed thereby.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of February 1, 1950, is as follows:

"In making an examination of the records and accounts of the Board of Education of Limestone County, a clarification on several matters of law is necessary and your official opinion is respectfully requested on these several matters set out below:

"Reference is made to the following: Local Acts, 1947, page 123, Local Acts, 1949, pages 225, 226 and 227, (Approved July 6, 1949); General Acts 1943, page 573, (Code of Alabama, 1940, Section 107(1), Title 52, 1947 Cumulative Supplement); Section 281, Constitution of Alabama, 1901.

"1. Inasmuch as the term of the Superintendent of Education begins July 1, would the Superintendent whose elective term began on July 1, 1949 come under the provisions of the above mentioned Local Act of 1949, page 225, which was not approved until July 6, 1949? (Your attention is respectfully called to Acts 1943, page 573, and Section 281 of the Constitution of 1901.)

"2. Are any additional duties placed on the Superintendent of Education in the Local Acts of 1949, *supra*?

"3. Inasmuch as the term of office begins on July 1 would the increase in salary under the provisions of Local Acts of 1949, page 225 (Approved July 6, 1949) be violative of Section 281 of the Constitution of Alabama of 1901?

"4. Would members of the Board of Education who were already in office at the time of the passage of Act No. 195 (Page 227, General Acts of Alabama 1949) be entitled to draw compensation at the rate of \$10.00 per day as provided for under such Act No. 195?

"5. Does such above mentioned Local Act provide for any additional duties for the board members?

"6. Would the 'additional meetings' as referred to above in the Local Act be construed as additional duties?

"I will appreciate an early reply to the above questions as we are directly concerned inasmuch as it is necessary to have your opinion on the above in order to properly audit the records and accounts of the above mentioned Board of Education."

I am of the opinion that Act No. 194, Acts of Alabama 1949, page 225, is not applicable to the present incumbent. To make it so applicable would do violence to Constitution of Alabama 1901, Section 281, which provides:

"The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The present incumbent began his term of office on July 1, 1949, but the act in question was approved on July 6, 1949. This act took effect immediately upon its passage. *State v. Stearns*, 200 Ala. 405, 76 So. 321. It is clear, therefore, that the incumbent's term had begun when the act

became effective. You are, therefore, advised that this act does not apply to the present Superintendent of Education of Limestone County. Quarterly Report of Attorney General, Vol. 49, page 16.

You are further advised that said act does not place any additional duties upon the office of County Superintendent of Education of Limestone County.

I am also of the opinion that Act No. 195, Acts of Alabama 1949, page 227, is applicable to members of the county board of education who were already in office at the time said act became effective. Title 52, Section 67, Code of Alabama 1940, provides four regular meetings each year for county boards of education, whereas the act in question requires the board to meet twelve times annually. It is my opinion that such additional duties have been imposed on said board as to authorize the increase in compensation to take effect immediately. *Taylor v. Davis*, 212 Ala. 282, 102 So. 433; *Morgan County v. Edmonson*, 238 Ala. 522, 192 So. 274; *Marion County v. Middleton*, 246 Ala. 464, 21 So. 2d 312.

What I have said in the above is a complete answer to all of the questions propounded by you, and I do not deem it necessary to answer your questions as numbered.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 13, 1950

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Health and Health Department—County Boards of Health—
Officers and Offices—Prisons and Prisoners—Department of
Public Welfare—Words and Phrases.

1. Private practice of medicine within the meaning of Title 22, Section 12, Code of Alabama 1940, is the discovery and treatment of disease in private individuals as distinct from the preservation of public health.

2. The isolated rendition of first aid by the County Health Officer in emergency cases does not constitute private practice within the meaning of Title 22, Section 12, Code of Alabama 1940.

3. County Health Officers are forbidden to engage in private practice and, therefore, cannot treat indigent cases on the welfare rolls or county or city prisoners.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of November 16, 1949, is as follows:

"Your attention is directed to Alabama Public Health Law, Title 22, Chapter 1, Section 12. Powers of County Health Officer Defined. Specifically the first sentence.

"Please give an opinion on what is private practice as set out by this wording. Can the County Health Officer or his Assisting Physician legally within the meaning of the law, be permitted to render medical services to (a) indigent cases on the Welfare roll (b) emergency cases where no physician is available (c) treat the County and City prisoners. Where no fee or compensation other than that provided in the County Health Unit Budget and within the Merit System provisions is received."

In answer to your questions, it is my opinion that Title 22, Section 12, Code of Alabama 1940, would prohibit the county health officer from treating (a) indigent cases on the Welfare rolls and (c) county and city prisoners.

This section would not prohibit the rendering of first aid in (b) emergency cases where no physician is available. I do not believe that it is the intent of the statutes to forbid emergency aid in such cases. Humanitarian and Christian concept require each of us to render aid in accord with our individual knowledge and skill in case of emergency. Certainly the Legislature did not intend that a trained physician should let a man die when medical skill could save him. The isolated rendition of first aid in such cases would not constitute private practice within the meaning of Section 12, *supra*.

Section 12, *supra*, reads as follows:

"§ 12. Powers of county health officers defined.—The county health officer, elected as provided in section 8 of this title, shall devote all of his time to official work, and shall under no circumstances engage in private practice. He shall, under the direction of the state health, have sole direction of all sanitary and public health work within the county, including incorporated municipalities, and shall employ for his assistants, subject to the approval of the county board of health, such number of physicians, nurses, clerks, inspectors, and other employees as are found necessary to accomplish the work. The county health officer may remove from office any assistant or employee."

I note also that by Title 22, Section 8, Code of Alabama 1940, the county board of health elects the county health officer "who shall devote

all of his time to the duties of his office" and by Title 22, Section 5, Code of Alabama 1940, he is a "full time" officer.

From the foregoing, it seems clear that the object of the law is to assure that the county health officer devotes all of his time to his official duties in the field of public health and that to insure this end he is forbidden to engage in private practice.

Private is defined as "affecting or belonging to private individuals, as distinct from the public generally." Black's Law Dictionary, Page 1419.

Practice of medicine is defined as "the discovery of the cause and nature of disease and administration of remedies, or the prescribing of treatment therefor." Black's Law Dictionary, Page 1394.

"Public Health" means the prevailing healthful or sanitary condition of the general body of people or the community in mass, and the absence of any general or widespread disease or cause of mortality. The wholesome sanitary condition of the community at large. *State ex rel. Pollock v. Becker*, 289 Mo. 660, 233 S. W. 641, 649; Black's Law Dictionary, Page 882.

Construing these definitions together with the statutes, *supra*, I conclude that the presence or absence of compensation does not affect the question. The purpose of the statute is to divorce the county health officer from all private practice so that he can devote his full time to the important public duties of his office and thereby protect the public as a whole.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 15, 1950.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Licenses—Pool Tables.

A pool table of whatever nature, upon which the game of billiards or pool is played with a fee charged for the use of such table, is to be licensed under the provisions of Title 51, Section 575, Code of Alabama 1940, even though such fee is collected by the depositing of a coin in a slot rather than by direct payment to the owner or operator of such pool table.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 6, 1949, is as follows:

"It is requested that an official opinion be rendered regarding the proper license for the following described article.

"This article is commonly referred to as a miniature pool table and to play a game thereon requires the depositing of a coin in a slot. The dimensions and operations of this so-called miniature pool table are as follows:

"The table varies in size from 3 ft. x 6½ ft. to 3½ ft. x 7½ ft. The pool balls used upon this table vary in size from 1¾ in. to 2 in. in diameter. Usually there are ten balls to the table. As the game is played, the pool balls drop into the pockets and instead of being held there, roll on through into a box in the center of the underside of the table. Either a nickel or a dime is placed in a slot which releases the balls after the preceding game has been played. However, the cue ball is larger than the pool balls and will not drop into the usual runner or through where the pool balls drop, but goes into a different trough and returns to the player free. The pool balls are racked-up on the table for each game the same as on a regular pool table.

The dimensions of the cue sticks that are used for the above table vary. A regulation cue stick could be used upon the above table.

"The difference between this type of table and a regulation pool table is its size, number and size of the balls, and the fact that this table has a coin-in-the-slot device as a means for paying for each game played. The size of a regulation pool table is 4 ft. x 8 ft. and 4 ft. x 8½ ft., and the number of pool balls with a regulation table is usually fifteen.

"There are three sections of Title 51, Code of Alabama 1940, apparently applicable to the above described table:

"Section 575, POOL TABLES; Section 591, SLOT MACHINES; and Section 613, as amended, VENDING MACHINES.

"It is requested that you give me your opinion as to which of the above sections of the Code this table should be licensed under. In connection with this, I also call your attention to the provisions of Title 14, Section 239, Code of Alabama 1940."

In my judgment, the table or device described by you in your request for opinion should be licensed under the provisions of Title 51, Section 575, Code of Alabama 1940. This particular statute provides, in pertinent part, as follows:

"Each pool table upon which the game of pin pool, bottle pool or starboard pool, or other like device is played, one hundred dollars. For each table upon which the game of pool or billiards is played with fifteen balls or more or less, and not pin pool, twenty-five dollars. * * * * "

It is significant to note that this statute makes no reference to the size of the table therein licensed, but predicates the amount of such license fee solely upon the nature of the games played upon such table. It should likewise be noted that the number or size of the pool or billiard balls used in the conduct of such games is likewise of no material import, but here again the nature of the game played is the determining factor. As I understand your request for opinion, the type of game therein described as being played upon the table you mention is a form of the game of pool or billiards and as such comes within the purview of the above statute.

As you will note, I attach no significance to the fact that the table used is of a slightly smaller size than that of the standard pool table. The statute does not make the size of the table any criterion for license. The fact that some greater or lesser number of balls than fifteen might be used in the conduct of the games played upon such table is recognized by the statute and provisions therefor are therein made.

Lastly, in my opinion the fact that the use of such table and balls is obtained by placing a coin in a slot is of no consequence insofar as the licensing thereof is concerned. This to me is nothing more than a means of collection from customers for the use of such equipment and has no bearing upon the licensing feature here under consideration. In my opinion, it makes no difference, insofar as the licensing of this table is concerned, whether the user thereof pay the fixed charge for such use by placing a coin in a slot or by some other means such as direct payment to the owner or operator of such table.

It is true that the table or device herein described might be deemed to be included within those machines, devices and tables described within Title 51, Section 591, Code of Alabama 1940. One might legitimately resort to this construction if there was no statute such as Section 575, supra, placing a specific license upon pool tables as such. However, in view of the fact that the object herein considered is by name, description and nature a pool table, and nothing else, and in view of the further fact that Section 575, supra, specifically imposes a license fee upon pool tables, I can only conclude that the pool table described by you in your request should be licensed under Section 575, supra, and that those other licensing statutes mentioned by you, to-wit, Section 591, supra, and Title 51, Section 613, Code of Alabama 1940, as amended, have no application to the licensing of this pool table.

This opinion is in full accord with a former opinion of this office rendered to the Hon. S. R. Butler, Commissioner, State Tax Commission,

under date of August 12, 1931, and found reported within the Opinions of the Attorney General, Office Edition, Volume 5, page 229.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 9, 1950.

Honorable Sibyl Pool,
Secretary of State,
CAPITOL.

Ballots—Elections—Names.

Secretary of State should not use the title "Dr." or "M. D." in certifying names of candidates to the judges of probate, unless necessary to distinguish candidates with the same or similar names.

Opinion by Assistant Attorneys General Straub and Hardin.

Dear Miss Pool:

Your request for an official opinion, bearing date of March 6, 1950, is as follows:

"The Chairman of the State Democratic Executive Committee in certifying to this office the names of candidates to appear on the ballots in the forthcoming primary elections, in several instances has certified Dr. _____ as a candidate for _____ office, and in one instance has certified _____ M. D. as a candidate for _____ office.

"Your opinion is requested as to whether or not in certifying these names to the probate judges I should use the title Dr. or M. D.

"I am prompted in requesting your advice in the premises in view of an opinion rendered Hon. John Brandon, Secretary of State, on March 12, 1940, found in Volume 18, of your Quarterly Reports, page 311.

"In view of the fact that these certificates should go out to the Probate Judges immediately, your early attention is requested."

Your attention is invited to Act No. 601, General Acts 1947, page 444, now found in the 1947 Cumulative Pocket Supplement, Code of Alabama 1940, as Title 17, Section 344. The above cited section provides that the Secretary of State must certify to the judges of probate the names of candidates for nomination. Whether a title such as "Dr." or "M. D."

should be included is dependent upon the question of whether such title is a part of a person's name.

It is my opinion that the titles "Dr." and "M. D." do not constitute a part of a person's name. Courts of this country have so held. *Hamilton v. Shredded Wheat Sales*, 172 A. 614, 54 R. I. 285; *Gears v. State*, 176 N. E. 553, 203 Ind. 3.

In an Ohio case dealing with this question, the Supreme Court of Ohio declared that the letters "M. D." should not be placed on the ballot unless such letters were necessary to distinguish two candidates having the same or similar names. *State, ex rel. Whetsell v. Murphy*, 174 N. E. 252.

Therefore, unless necessary to distinguish two or more candidates having the same or similar names, the Secretary of State should not use the title "Dr." or "M. D." in certifying names of candidates to the judges of probate. See also Quarterly Report of Attorney General, Volume 18, page 311, wherein a similar question was discussed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 14, 1950.

Hon. A. P. Wilson, Clerk,
Town of Hodges,
Franklin County,
Hodges, Alabama.

Municipalities.

The mayor in towns of less than six thousand population is a member of the legislative council; and, as such, he may vote or not at his discretion, except in the case of a tie, in which event he must vote.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of October 19, 1949, is as follows:

"Will you kindly advise us as to the opinion of your office on the following matter.

"Hodges is a small town in Franklin County State of Alabama with a population of about two hundred inhabitants.

"We have been using one police in said town and a few weeks ago he resigned which made it necessary to replace him with another man. Several good men made application for the job and the council met in special communication to act upon the matter of electing one of the applicants for the job as police for said town.

"After all applicants had been considered and eliminated except two the final vote was taken which was tied as follows:

"The mayor and two aldermen voted for A.

"The other three aldermen voted for B.

"The question arose about the mayor's vote. Some of the aldermen were of the opinion he should not have voted and caused a tie or deadlock. The other aldermen and the mayor himself were of the opinion he had the right to vote and should have exercised it.

"Will you please let us have the opinion of your office as early as possible?"

The question presented by your inquiry is: Does the mayor in cities and towns of less than six thousand inhabitants have the right to vote as a member of the town council?

A study of our statutes convinces me that the mayor in towns of less than six thousand population is a member of the legislative council; and, as such, he may vote or not at his discretion, except in the case of a tie, in which event he must vote. Title 37, Section 404, Code of Alabama 1940.

Section 404, *supra*, reads, in pertinent part, as follows:

"In all cities and towns having a population of less than six thousand inhabitants according to the last or any subsequent federal census, the legislative functions shall be exercised by the mayor and five aldermen. The mayor shall preside over all deliberations of the council. At his discretion he may vote as a member of the council on any question coming to a vote, except in case of a tie, in which event he must vote."

You will also note that throughout our statutes the mayor in towns of less than six thousand inhabitants is treated as a member of the legislative council. See Title 37, Section 429, Subsection 2, Code of Alabama 1940. (A majority of the members of the council, including the mayor, is necessary for a quorum.); and Title 37, Section 456, Code of Alabama 1940 (Ordinances only become law by vote of a majority of the council, consisting of "the mayor and three aldermen or four aldermen.").

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1950.

Hon. R. P. Allen,
President Board of Revenue,
Marengo County,
Linden, Alabama.

Marengo County—Tax Collectors—Board of Revenue.

The Board of Revenue of Marengo County must pay the salary of a clerk employed by the Tax Collector under the authority of (Local) Act No. 507, Acts of Alabama 1949, page 735.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 13, 1949, is as follows:

"I am writing with reference to the clerk hire bill, copy of which is hereto subjoined, whereby the tax collector of Marengo County is authorized to expend \$600.00 per year.

"Is it mandatory upon the Board of Revenue of Marengo County to pay this sum of money, or is it left to the discretion of the Board as to whether or not it is paid?"

The clerk hire bill mentioned in your inquiry, now appearing as Act No. 507, Acts of Alabama 1949, page 735, approved August 30, 1949, reads, in pertinent part, as follows:

"Section 1. That the Tax Collector of Marengo County is hereby authorized to employ, at public expense, a clerk or assistant to aid him in the performance of his official duties.

"Section 2. That the compensation to be paid such clerk or assistant shall be six hundred dollars (\$600.00) per year, payable out of the general fund of Marengo County in such amounts and at such times as the Tax Collector of Marengo County shall certify to the Board of Revenue of Marengo County, that the same is due to the clerk or assistant so employed."

A careful reading of Act No. 507, supra, convinces me that if the Tax Collector of Marengo County chooses to employ a clerk under the authority given him by this bill, and if he complies with the statute in other respects, it would be mandatory on the part of the Board of Revenue to make the payments outlined in the act, supra. The Board's discretion in such a case would be limited to ascertaining the validity of the claim.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1950.

Hon. R. L. Malone,
Judge of Probate,
Limestone County,
Athens, Alabama,

Elections—Voters.

To arrange alphabetically the voters of eight election districts and require them to vote at a common voting place would be contrary to Title 17, Section 86, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of February 8, 1950, is as follows:

"Our Board of Revenue has divided the Athens Beat No. 1, into (8) boxes, instead of four we formerly had.

"I'm just wondering if it will be permissible for me, so long as they all vote around the Court House in the eight boxes, if I could arrange this voting list alphabetically, and to illustrate, say Box 1, people with names beginning with A and B and so long until this eight boxes will have been equally divided as near as possible.

"I will appreciate an answer from you by return mail, if you think this can be done.

"P. S. This letter is written by request of the Tax Collector."

It is my opinion that your inquiry must be answered in the negative. To arrange alphabetically the voters of eight election districts and require them to vote at a common voting place would be contrary to Title 17, Section 86, Code of Alabama 1940, which provides:

"Where election precincts have been divided or subdivided into districts hereunder, no voter in any elections held thereafter shall vote at any place other than the election district in which said voter is, at the time, registered as a qualified elector."

Cf. Quarterly Report of the Attorney General, Volume 49, page 79, a copy of which is herewith enclosed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1950.

Hon. Otis R. Burton,
Tax Collector,
Talladega County,
Talladega, Alabama.

Taxations—Exemptions—Factories.

A fertilizer plant is not entitled to the ad valorem tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion dated January 7, 1950, is as follows:

"I have been requested by Mr. H. A. Parker of Sylacauga, President of Sylacauga Fertilizer Co., to ask you for your official opinion regarding tax exemption granted him by The Governing Body of Talladega County, and revoked by State Examiners.

"1. Under date of February 2, 1949, The Governing Body of Talladega County, passed a resolution exempting Sylacauga Fertilizer Co. of County Ad valorem Tax on their new fertilizer plant beginning October 1, 1948 thru 1953, under Section 3 of Title 1 of the Code of Alabama of 1940.

"2. At a later date the State Examiners in examining my records, claimed this exemption was illegal and instructed the Tax Assessor and myself it could not be granted, and charged same back with instructions to collect.

"3. Mr. Parker in paying his tax on The Sylacauga Fertilizer Co. for 1949, paid the amount of this exemption under protest, feeling that The County Governing Body had full authority to grant this exemption under Section 3, Title 41 of The Code of Alabama 1940, stating in his protest, that this Section specifically states, 'or any other manufactured product.'

"I will appreciate very much your opinion in this connection at your earliest convenience."

It is my opinion that a fertilizer plant is not entitled to an exemption provided for by Title 51, Section 3, Code of Alabama 1940.

The pertinent excerpt from Section 3, *supra*, is as follows:

"§ 3. Exemption of certain factories, industries and plants.—For the purpose of encouraging the building, extending, and operation of

factories for the spinning of thread and yarns, * * * and factories for the manufacture of bags, wood pulp products, glass factories, ceramic factories, enameling factories and silica processing industries, paper, paper bags and other pulp products, wooden cabinets, and farm implements or mining of gold and graphite, or any other manufactured products, * * * the court of county commissioners, or other court or any county, * * * are authorized and empowered to remit the taxes assessed for all county and municipal purposes, * * * ." (Emphasis added.)

Although such section contains the expression, "or any other manufactured products, * * *," the doctrine of *ejusdem generals* limits the general products to those of the same nature of the particular products previously enumerated in the section. None of the plants mentioned is of the nature of a fertilizer plant. Exemptions from taxation are strictly construed against the claimant and in favor of the taxing authority.

In accordance with the previous holdings of this office, the expression "or any other manufactured products," is limited to other manufactured products of the kinds and nature previously mentioned in Section 3. Quarterly Report of Attorney General, Volume 51, page 225; Quarterly Report of Attorney General, Volume 55, pages 148, 152.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1950.

Hon. Henry W. Smith,
President, Board of Revenue,
Etowah County,
Gadsden, Alabama.

Bailiffs—Inferior Courts—Etowah County—Courts.

1. The act creating the County Court of Etowah County (Act No. 578, Local Acts 1947, page 390) does not provide for the appointment of a bailiff.

2. The general laws authorizing the appointment of Bailiffs, Title 13, Sections 186, 187, 188, Code of Alabama 1940, as amended, do not apply to inferior courts, but only to circuit courts.

3. There being no office of bailiff in the County Court of Etowah County, there can be no payment by the county for services as bailiff.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 16, 1949, is as follows:

"As President of the Etowah County Board of Revenue, and under authority of Title 55, Section 240 of the 1940 Code of Alabama and amendments thereto, I respectfully request an opinion of you on the questions arising from the following statements:

"Mr. Herbert C. Burns, duly elected and serving Constable of the County Court of Etowah County, Alabama, said Court organized and existing under Act Number 578 of the 1947 Local Acts of Alabama, has filed a sworn claim with the Board of Revenue of Etowah County by which he claims the sum of \$400.00, or for such reasonable compensation as may be due him for services rendered to the County Court as Court Bailiff over a period of time as set forth in said claim. A copy of the claim is hereto attached. By letter dated December 15, 1949 addressed to the Board of Revenue, and which is on file with the Board, Honorable George D. Motley, Jr., Judge of County Court, Etowah County, states that on January 17, 1949, the time at which the Etowah County Court came into being, it was his opinion that it was necessary for the proper functioning of the Court for someone to act as Bailiff and that it was his opinion that Mr. Herbert Burns, the Constable, was qualified to act in such capacity and that upon Judge Motley's request the said Herbert Burns agreed to act as Bailiff. He further stated in said letter that each day spent by the said Burns acting as Bailiff necessarily prevented him from performing his duties as Constable and therefore resulted in a loss of compensation for him. A copy of the letter from Honorable George D. Motley, Jr. is hereto attached.

"Act Number 578 of the 1947 Local Acts of Alabama by which the Etowah County Court was established is silent as to the authority of the Judge of said County Court to appoint a Bailiff, as to whether the Constable of the Court is authorized to act as Bailiff and is also silent as to the authority of the Board of Revenue of Etowah County to pay for the services of a Bailiff.

"The questions arising under the foregoing statements and which the Board of Revenue of Etowah County requests your opinion are as follows:

"1. Does the Board of Revenue of Etowah County have authority to pay the said Herbert C. Burns, Constable, for services rendered as Bailiff to the County Court of Etowah County on the dates set out in said claim attached hereto?

"2. If the answer to question one is in the affirmative, what amount, per day, is the Board of Revenue of Etowah County authorized to pay the said Herbert C. Burns for services rendered as Bailiff on the days set out in said claim hereto attached?

"Your attention is directed to the following citation.

"A. Letter dated January 5, 1949, addressed to Mr. Herbert Burns, Gadsden, Alabama, signed A. A. Carmichael, Attorney General, by Bernard F. Sykes, Assistant Attorney General.

"B. Title 12, Section 110, 1940 Code of Alabama.

"C. Attorney General Quarterly Reports, Volumes 15 and 22, Pages 13 and 194 respectively.

"Your usual prompt attention to matters of this nature will be greatly appreciated."

In my opinion the Board of Revenue of Etowah County does not have authority to pay for services rendered as a bailiff to the County Court of Etowah County.

The County Court of Etowah County was created by Act No. 578, Local Acts 1947, page 390. Nowhere in the Local Act is there any provision for the appointment of a bailiff for that court.

The general laws of the State, authorizing the appointment of bailiffs, provide for the appointment of bailiffs in the circuit court, and do not apply to the appointment of bailiffs in inferior courts. Opinions of the Attorney General, Office Edition, Vol. 5, page 292, rendered August 25, 1931.

The provisions of the Local Act, *supra*, failing to authorize the appointment of a bailiff, and the provisions of the general law as to the appointment of bailiffs not being applicable to the County Court of Etowah County, leaves no statutory provision authorizing the appointment of a bailiff for that court.

It has been held that courts of record having general jurisdiction or courts of last resort have inherent power to provide the necessary attendants or assistance as a means of conducting the business of the court. 15 C. J. page 871, 872. It is my opinion, however, that the County Court of Etowah County is an inferior court of limited jurisdiction, and cannot be said to be of the type that possesses the inherent authority to appoint officers.

It is also significant to note that the Local Act creating the County Court of Etowah County, *supra*, provides for other officers. The act provides for the judge, the constable, and clerk of said court, and makes it the duty of the sheriff to attend said court. It is further made the duty of the deputy solicitor to prosecute criminal cases in said court. See Local Act No. 578, *supra*. In my opinion, therefore, the Legislature did not intend that the County Court of Etowah County have a bailiff.

It is further my opinion that since there is no office of bailiff, no claim could be made for compensation as bailiff by any person who at-

tempts to act as bailiff under the provisions of Title 12, Section 110, Code of Alabama 1940. Biennial Report of Attorney General, 1928-30, page 499.

In view of our answer to your question number 1, answer to your question number 2 is unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 21, 1950.

Hon. Roy E. Blair,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Licenses—Shuffleboard.

A shuffleboard, as is described, is not one of the devices which come within the meaning of Title 51, Section 507, Code of Alabama 1940.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of February 27, 1950, is as follows:

"It is requested that you furnish this Department with an official opinion as to whether or not a 'shuffleboard,' as described below, is a device subject to be licensed under the provisions of Title 51, Section 507, Code of Alabama 1940.

"The approved 'shuffleboard' is constructed of laminated hard maple and sits in the center of a table, having fowl troughs on each side and at the end. The table is 22' long and the board, which is on the table, is 8" x 20" x 20'. Lines are inscribed in the wood of the board across the playing field 6", 12", and 6' from each end of the board. Numerals are inscribed in the wood of the board, a numeral 3 being located between the 6" line and the end of the board; a numeral 2 between the 6" and the 12" lines; and a numeral 1 between the 6' and the 12" lines.

"The game is played by driving with the hands pieces of metal known as pucks or wates toward the marks or numerals on the board, as indicated above. These pucks or wates are $2 \frac{5}{16}$ inches in diameter and weigh 12 ounces and are machined of hard steel. Shuffleboards are used by persons as a source of profit to themselves.

"Attached hereto is a brochure describing the board, which is supplied to aid in visualizing the board and game."

Title 51, Section 507, Code of Alabama 1940, the statute levying the license which we have under consideration here, is as follows:

"Devices for testing skill and strength used for profit.—For each device used by persons as a source of profit to themselves, such as throwing at wooden figures, or any object of like character, striking at an object to test the strength, blowing to test the lungs, or other devices of like character, or for operating a cane rack, a knife rack, or similar rack or table, twenty-five dollars, to be paid in each county in which it is operated, but this section shall not be construed to legalize the operation of any device which is now prohibited by law." (Emphasis ours.)

It cannot be said from the express language of the statute that the Legislature intended that the definitions contained therein were to contemplate or include the shuffleboard device which has been described by you in some detail in your letter.

The shuffleboard device, which you describe, certainly does not fit any of the special definitions contained in the statute, all of which I have underscored; nor can it be said that this device is at any place specifically referred to. If it is to be said to come within the meaning of the statute at all, then it must come under its general provisions or classifications, which I have also emphasized.

Considering the question then as to whether the device might be read into the general classifications or general definitions of this statute, it is noted that this office has on other occasions, and where the construction or other tax or license statutes were involved, both recognized and given effect to the doctrine of "ejusdem generals." See Quarterly Reports of Attorney General, Volume 51, page 225; Volume 54, page 46; Volume 55, pages 59, 148 and 152. This rule of construction, which this office has so applied, simply means that where general words follow an enumeration of things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to things of the same general kind or class as those specifically mentioned. See Black's Law Dictionary, Third Edition, Page 645.

Moreover, whether the general classifications or general descriptions of the statute could be said to include within its terms this shuffleboard device, is a question of extreme doubt, which might, if answered in the affirmative, require reading into the act something which is not clearly there.

Where such doubtful construction exists, then the recognized rule is that the courts are to give such statutes a strict construction in favor of the licensee. See 33 Am. Jur. 329, 118 A.L.R. 1363, etc.

Also, where the question arose as to whether a miniature pool table came within the meaning of this same statute, this office held that it did not, in an opinion reported in Biennial Report of Attorney General, 1930-1932, page 373. In holding that the pool table device did not come within the purview of this statute, it was pointed out that:

"With these definitions in mind, it would appear that for a device to be liable for license under this Schedule it must so resemble one of the devices described as to be almost a counterpart thereof. 'Table' as used in the Schedule evidently refers to tables where there is some sort of rack duplicating the ordinary cane rack or knife rack. I do not think the table which you describe is such a table."

For the foregoing reasons, I am of the opinion that the shuffleboard device or table about which you make inquiry does not fit any of the descriptions or classifications contained in Section 507, *supra*, and is, thus, not one of the devices which is contemplated under said statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 21, 1950.

Hon. Asa Rountree, Jr.,
Director of Aeronautics,
State of Alabama,
CAPITOL.

Airports—Bids—Contracts.

Where awarding authority specifies alternate materials in invitation to bid on airport paving projects, said authority must award the contract to the lowest responsible bidder regardless of paving selected, so long as the paving to be used is one of the alternates.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1950, is as follows:

"Subject: Effect of Resolution of Alabama Aeronautics Commission Relative to Competitive Bidding.

"At a regular meeting of the Alabama Aeronautics Commission on February 7, 1950, with a quorum present, the following resolution relative to runway paving specifications for Federal-State Aid Airport Projects was unanimously adopted:

"That any specifications for airport paving for which this department has made, or shall make, a state grant, shall be on a competitive basis and shall not be limited to a single specification as to materials used.'

"The State of Alabama, through this department, provides state grants for the construction or improvement of all airports authorized under the Federal Airport Act of 1946. This resolution was adopted so as to further insure that specifications and contract awards would be on an equitable, competitive basis.

"We wish to ask your official opinion on the following question:

"Where the specifications on which bids are to be received, permit the alternate use of two or more types of paving material, any one of which meets required standards, is it compulsory to accept the low bid, regardless of type of material?"

Section 5 of Act No. 492, General Acts 1947, page 338, which is now found in the 1947 Cumulative Pocket Supplement to the Code of Alabama 1940 as Title 50, Section 15(5), in speaking of public works' contracts, provides, in part, as follows:

"Section 5. AWARD OF CONTRACT.—The contract shall be awarded to the lowest responsible bidder complying with conditions of the invitation for bids, unless the awarding authority finds that his bid is unreasonable or that it is not to the interest of the awarding authority to accept it. * * * "

It is uniformly held that where statutes speak of the "lowest reasonable bidder," it is not necessary for the awarding authority to let the contract to the bidder submitting the lowest bid. In the case of *Inge, et al v. Board of Public Works of Mobile*, 135 Ala. 187, 33 So. 678, the Supreme Court of Alabama held that in deciding the responsibility of bidders it is the duty of the municipal officers not only to consider the pecuniary ability of the bidders to perform the contract, but also their skill and integrity.

Your attention is called to the fact that the awarding authority may reject the lowest bid if the same is unreasonable or if it is not to the interest of the awarding authorities to accept it. Therefore, some discretion is left to the awarding authority in the letting of bids.

However, it is my opinion that when the awarding authority specifies alternate material for airport paving projects, it implies that either material will be suitable, and may not choose the material after the bids are opened. The lowest responsible bidder must be awarded the contract regardless of the type of material used, so long as such material is one of the alternates specified, unless such bid is unreasonable or not to the interest of the awarding authority.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1950.

Hon. John M. Gallalee,
President,
University of Alabama,
University, Alabama.

University of Alabama—Insurance — Funds — Automobiles—
Schools.

The Board of Trustees of the University of Alabama may not
expend funds for liability insurance on its fleet of automobiles.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of May 25, 1949 is
as follows:

"Your opinion is respectfully requested in answer to the follow-
ing question:

"May the Board of Trustees of the University of Alabama take
out property loss and personal liability insurance on its fleet of
automobile?"

"It is recognized that the University, as an arm of the State
government, cannot be sued, yet nevertheless, damage claims can be
collected against it through the State Board of Adjustment.

"Therefore, we desire this class of insurance, not only as a pro-
tection to the public, but also as a protection to the University as well."

The University of Alabama is not liable, as an agency of the State,
for torts resulting from the operation of its automobiles by its officers,
faculty members, or students. Quarterly Report of Attorney General,
Vol. 9, page 62.

Therefore, the funds of the University of Alabama may not be ex-
pended to pay premiums on liability insurance. See: Quarterly Report
of Attorney General, Vol. 55, page 168. (The jurisdiction of the State
Board of Adjustment extends to county boards of education. *Hawkins v.*
State Board of Adjustment, 242 Ala. 547, 7 So. 2d 775.)

This opinion does not cover insurance taken out against loss or
damage to the automobiles owned by the University. See Quarterly Re-
port of Attorney General, Vol. 55, page 168, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1950.

Hon. John G. Hosey,
Chairman, Board of Registrars,
Jefferson County,
102 Courthouse,
Birmingham 3, Alabama.

Elections—Voters—Registration—Board of Registrars—Constitution of 1901—Criminal Law.

Manslaughter in the second degree is not a crime involving moral turpitude, within the meaning of Section 182, Construction of Alabama 1901, and Title 17, Section 15, Code of Alabama 1940, providing that any person convicted of a crime involving moral turpitude is thereby disqualified from registering and voting.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of February 21, 1950, is as follows:

"The law is not clear as to what constitutes moral turpitude, and there seems to be much confusion in the interpretation of this phrase. Our Constitution, Sec. 182, sets out numerous crimes which disqualify an elector—person seeking to qualify as such and concludes as viz: 'or any crimes punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude.'

"I don't think our Supreme Court has passed upon this precise question, that is as to whether or not manslaughter in the second degree constitutes moral turpitude. Our Court did hold that when the question was propounded to a witness, as to whether he had been convicted of manslaughter, and the degree not specified the Court would not be put in error for overruling an objection. The decisions will be found in 160 Ala. 82 and 140 Ala. 29.

"The District Court of U. S. in a Nebraska case rule in defining moral turpitude that it is a crime mala in se, infamous offenses, and those classed as felonies involving moral turpitude, and none others, 19 F. 2d, 722-25.

"In a very well considered case by Conn. Court it is said:

" 'Moral turpitude often involves the question of intent, and as a general rule unintentional wrong, or an improper act done without unlawful or improper intent, does not carry with it the germ of moral turpitude.' 111 A. 861, 94 Conn. 500.

"In prosecutions for manslaughter in the second degree an intent to kill is not an essential element of the offense. In fact the indict-

ment alleges in manslaughter that the act is committed without malice or the intention to kill, and it is a misdemeanor under the law.

"This board does not want to disqualify a man unless the law disqualifies him, and, therefore, I am writing to request your opinion as to whether a man convicted of manslaughter in the second degree is disqualified to register and vote under our Constitution.

"I shall appreciate your rendering a decision in this matter right away because we have some more registration days in March and the first of April."

Your question is answered in the negative.

In addition to Section 182, Constitution of Alabama 1901, which provides that any person convicted of a crime involving moral turpitude is thereby disqualified both from registering and from voting, a similar provision is found in Title 17, Section 15, Code of Alabama 1940.

Title 14, Section 320, Code of Alabama 1940, thus defines the two degrees of manslaughter:

"Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree; and manslaughter committed under any other circumstances is manslaughter in the second degree."

Manslaughter in the second degree, or so-called involuntary manslaughter, is where it plainly appears that neither death nor great bodily harm was intended, but death is accidentally caused by some unlawful act, or an act strictly lawful in itself, but done in an unlawful manner, or without due caution. See *Williams v. State*, 251 Ala. 397, 39 So. (2d) 37. It is an act done without contemplation of death, without malice, without evil intent, and ordinarily is committed while the accused is engaged in a lawful act and homicide results through his carelessness, or because of the absence of due caution or circumspection.

The term "moral turpitude" is one which has been the subject of many decisions and which has been much defined by the courts. Like the term "reasonable doubt," its definition does not gain in clarity by prolixity of statement. The courts of this state have adopted this generally accepted definition: "Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." See *Ex parte Marshall*, 207 Ala. 566, 93, So. 471; *Pippin v. State*, 197 Ala. 613, 73 So. 340; *Gillman v. State*, 165 Ala. 135, 51 So. 722; *Moore v. State*, 12 Ala. App. 243, 67 So. 789; 58 *Corpus Juris Secundum*, page 1201.

Since manslaughter in the second degree is not punishable by a penitentiary sentence, it is merely a misdemeanor, not a felony. See Title 14,

Section 322, and Title 1, Section 7, Code of Alabama 1940. While generally felonies are crimes involving moral turpitude, and while generally misdemeanors do not involve moral turpitude, the nature of the crime, not its classification as felony or misdemeanor, determines the presence of moral turpitude. The annotations placed in the Code of Alabama 1940, under Title 7, Section 434, notwithstanding, I do not construe *Pippin v. State*, supra, as holding that the crime there involved does not involve moral turpitude necessarily because it is a misdemeanor.

It has been decided that moral turpitude is not involved in a charge of crime unless the offense is intentional or not innocent in its purpose, or not accidental. *Brun, et al. v. Lazzell*, 172 Md. 314, 191 Atl. 240. It has further been specifically held that manslaughter in the second degree, or so-called involuntary manslaughter, is not an offense which involves moral turpitude, within the meaning of a federal statute authorizing the deportation of an alien convicted of any crime involving moral turpitude. *United States ex rel. Mongiovi v. Karnuth* (D. S.—N. Y.), 30 Fed. (2d) 825. I am of the opinion that the same conclusion must be applied to an interpretation of Sections 182 and 15, supra, and I so hold.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 27, 1950

Hon. L. A. Whetstone,
Tax Assessor,
Jefferson County,
106 Courthouse,
Birmingham 3, Alabama.

Ad valorem Taxes—Exemptions—Taxation.

Real property used exclusively as an educational institution for handicapped children is exempt from ad valorem taxation, even though part of such property constitutes a residence which accommodates the students and such faculty necessary to care for the students residing therein. (Section 91, Constitution of Alabama 1901; Title 51, Section 2, Code of Alabama 1940.)

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of January 9, 1950, is as follows:

"The Charlanne School, through its attorney, Mr. Evans Dunn, has submitted application for tax exemption as set forth below. I would appreciate your advising me if this application comes within Article

4, Section 91 of the Constitution as set forth in the Code of Alabama, Title 51, Section 2.

"For your further information I understand the school charges a tuition of \$65 a month per pupil. However, the County Superintendent of Education furnishes three teachers in said school who are paid by the County Board of Education, and all grades are taught therein from kindergarten through the twelfth grade.

"I will appreciate your early opinion as to whether or not I can legally set up this property as exempt under the above quoted statutes.

"APPLICATION FOR TAX EXEMPTION

"Unit Number 4-827-2

"Lots 1 to 8 inclusive, in Block "M" in South Highlands Land Company's Second Addition to Edgewood, as recorded in Map Book 7, page 78; also that part of the NE $\frac{1}{4}$ of NW $\frac{1}{4}$, Section 13, Township 18, Range 3 West, lying North of said Lots 1 to 8 inclusive, and South of Oxmoor Road as shown by said map, situate in Jefferson County, Alabama.

"The undersigned John W. Simpson, on behalf of his co-owner Wilmot S. Littlejohn and himself, petitions L. S. Whetstone, Tax Assessor of Jefferson County, Alabama, that the above described property be removed from the tax rolls of Jefferson County, Alabama and exempted from taxes, for that said property is used exclusively for educational purposes.

"Said property is operated as "Charlanne School" and has been since 1940. It is devoted to the education of handicapped children especially spastic children. Such children are placed in the school by The State of Alabama or by individuals. They live in the school, and in said school grades beginning with kindergarten and extending through the twelfth grade are taught. Five full time and one part time grade teachers are employed, including two teachers who are furnished by the Board of Education of Jefferson County. The school is subject to the inspection of the Superintendent of Education of Jefferson County, and the Board of Education of Jefferson County prescribes the course of study and the text books used in the school. The children attending the school, being handicapped are such that they need special instructions and special training, and are not physically able or equipped to attend the ordinary public schools. Charlanne School is set up, designed, and operated to afford an education for such handicapped children and to equip such children to take care of themselves and be self-supporting. There are from time to time during the year from forty to sixty students residing at the school and attending classes in the school. Charlanne School is exclusively an educational institution.

"The above-described property is improved with an old residence which has had two additions thereto to accommodate the students and faculty. None of the property is used for residential purposes, except by the students and the necessary staff to care for the students. The necessary staff, of course, resides in the building with the students, as it is essential that some adult be in resident with the handicapped children during their stay at the school for proper supervision and protection.

"Tuition is charged for all students and the members of the staff are paid salaries.

"(Signed) Jno W. Simpson,
John W. Simpson.

"Subscribed and sworn to before me this the _____ day of December, 1949.

"Mrs. C. H. Davidson,
(Seal) Notary Public."

The property which you describe is exempt from ad valorem taxation under Section 91, Constitution of Alabama 1901 and under Title 51, Section 2(a), Code of Alabama 1940. Compare *Anniston Land Company v. State*, 185 Ala. 482, 64 So. 110, and see supporting dictum at 185 Ala. 484 et seq.

The improvement which you describe is in reality a dormitory to house the handicapped students. (Your facts set out that the school itself is exclusively an educational institution.) Dormitories are such an essential part of the school plant as to come within the "exclusive use" proviso in tax exemptions for educational institutions. The fact that some faculty members, necessary to supervise the students living in the dormitories, reside therein does not defeat the exemption. The fact that the school charges tuition is colorless.

People v. N. Central College, 336 Ill. 263, 168 N. E. 269, considered the instant problem. There two dormitories were held exempt under similar exemption provisions. One of these dormitories housed forty-six students and two teachers; it was also used partially as a dinner hall. The other dormitory housed twenty-four students and one teacher.

Mayor v. State Board, 96 N. J. L. 334, 115 A. 342, is in point. Here a three-story dormitory was held exempt from taxation, where all rooms on the three floors were not occupied by students. The court stated that the mere fact that some of the rooms were occupied by teachers and caretakers who paid rent which was applied to their salaries did not deprive the school of its exemptions.

Another analogous case is *Elder v. Trustees of Atlanta University*, 194 Ga. 716, 22 S. E. 2d 515, 143 A. L. R. 268.

The property involved in your request comes within the exemption provisions of the Alabama Constitution (Section 91) and of the Alabama Code (Title 51, Section 2(a)).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 27, 1950.

Hon. Bankhead Bates,
Director, Department of Public Safety,
P. O. Box 1511,
Montgomery 2, Alabama.

Licenses—Motor Vehicles—License Inspectors—Fines—Highway Patrol.

1. (a) A violation of Title 36, Section 75, Code of Alabama 1940, occurs where the operator of a motor vehicle fails to have (1) license tags attached and plainly visible on the front and rear of his motor vehicle, or (2) fails to have any license tags whatsoever attached, or (3) has license tags attached which were issued for another vehicle. (b) Such violations are violations of the Rules of the Road, and the highway patrol may make arrests and institute proceedings against such offenders.

2. (a) A violation of Title 51, Section 834, Code of Alabama 1940, as concerns the licensing of motor vehicles, occurs where a motor vehicle has license tags attached, which, although issued for that particular motor vehicle, are old or delinquent tags. (b) It is the duty of the license inspector, not the highway patrol, to enforce the revenue laws in this respect.

3. The phrase "two-thirds shall be paid to the state," as used in Title 51, Section 834, Code of Alabama 1940, dealing with the disposition of fines collected from delinquent motor vehicle licenses, is to be construed as meaning that the two-thirds shall be paid into the General Fund of the State.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of February 7, 1950 is as follows:

"Please refer to Title 36, Section 75 of the 1940 Code of Alabama, also Title 51, Sections 834, 835, which concerns the licensing of motor vehicles. You will note that Title 51, Sections 834, 835, deals with certain procedures in prosecuting motor vehicle operators for failing

to properly license their vehicles. Please inform me if Highway Patrol Officers who are duly appointed under Title 36, Section 71, and who are commissioned as peace officers in this State, are authorized to enforce the revenue law of this State particularly as concerns the motor vehicle. If they are authorized to enforce this law will you please inform me as to the disposition of the fine or fines collected in such prosecutions as Title 51, Section 834, says two-thirds of such fines shall be paid to the State and one-third to the County but this does not indicate what department of the State shall receive the two-thirds.

"As we are in the middle of a controversy on this subject it will be sincerely appreciated if you will kindly expedite an opinion."

Title 36, Section 75, Code of Alabama 1940, provides in part:

"Each and every motor vehicle operator who operates a motor vehicle upon any city street or other public highway of or in this state shall at all times keep attached and plainly visible on both the front and rear end of such motor vehicle a license tag or license plate as prescribed and furnished by the department of revenue at the time the owner or operator purchases his license."

It is clear from the above that the operator of a motor vehicle must keep a license tag attached and plainly visible on both the front and rear ends of each motor vehicle operated over the highways of this state. If there be only one license tag or no license tags attached in plain view, an operator is in violation of this section. It is my opinion that so long as license tags issued by the State Department of Revenue are on the motor vehicle for which such tags were issued, and are plainly visible, there is no violation of this section. This is true regardless of the date of issuance of the tags. In short, the purpose of this section is to enforce the Rules of the Road, and is to protect the highways from motor vehicles bearing either: (1) only one license tag or no license tags; or (2) improper tags, in the sense that the tags attached were issued for some other motor vehicle. For violations of this nature, the highway patrol may make arrests and institute criminal proceedings, as it may do for other offenses of the Rules of the Road, such as reckless driving, etc. See Title 36, Section 71, Code of Alabama 1940, as amended.

Title 51, Section 835, Code of Alabama 1940, provides for license inspectors for the various counties and prescribes their duties. Title 51, Section 834, Code of Alabama 1940, provides in part:

"It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided."

Violations of Section 834, *supra*, are violations of the revenue laws of the State, and in my opinion must be distinguished from those violations

which occur under Section 75, *supra*. Violations under Section 834, *supra*, insofar as the licensing of motor vehicles is concerned, occur where the operator of a motor vehicle is delinquent in purchasing his license tags as provided for by Title 51, Section 704, Code of Alabama 1940. In such a case, the delinquent is operating his motor vehicle with the old tags attached and plainly visible. Such an offense is a violation of the revenue laws, and not a violation of the Rules of the Road. In such a case, therefore, the highway patrol has no authority to arrest him or to institute proceedings against him. Section 835, *supra*, provides that the license inspector shall institute proceedings in such cases. For the highway patrol to make the arrest and institute criminal proceedings would be an infringement upon the duties of the license inspector.

In providing for the disposition of fines collected in the prosecution of license delinquents, Section 834, *supra*, states in part: "two-thirds shall be paid to the state and one-third to the county." Our Supreme Court has held that the office of interpretation is to expound the statute, not to improve it, and that courts have no authority to look for legislative intention in anything but the legislative language, which, while it may be explained, can neither be detracted from nor added to. *May v. Head*, 201 Ala. 112, 96 So. 869. As stated by Mr. Chief Justice Gardner in *Holt v. Long*, 234 Ala. 369, 174 So. 759, one cardinal rule of statutory construction is that "we can only learn what the Legislature intended by what it has said, and have no right 'to stray into the mazes of conjecture or search for an imaginary purpose.'" To conclude that the provision "two-thirds shall be paid to the state" has any meaning other than that such two-thirds shall be paid into the general fund of the state would, in my judgment, be "searching for an imaginary purpose."

Moreover, the Supreme Court has held that funds "to be paid out of the county treasury" means, of course, that such funds shall be paid out of the general fund of the county. *Weaver et al v. Tidwell, County Treasurer*, 228 Ala. 169, 153 So. 218.

Therefore, it is my opinion that, should the Legislature have intended that the Highway Patrol or any other particular department or agency of the State receive the aforesaid "two-thirds to the state," as provided by Section 834, *supra*, it would have so specified. It is my further opinion that the provision, "two-thirds shall be paid to the state," means that such two-thirds shall be paid into the General Fund of the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 27, 1950.

Hon. W. T. McKee,
Custodian of County School Funds,
Montgomery County,
Superintendent's Office,
Montgomery 5, Alabama.

Montgomery County—County Superintendent of Education.

The County Board of Education of Montgomery County, under the authority of Act No. 222, Local Acts 1939, page 125, may increase the compensation of the County Superintendent of Education at any time.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1950, is as follows:

"At its last meeting (March 10, 1950) the Board of Education of Montgomery County, Alabama, adopted unanimously the following resolution:

"BE IT RESOLVED, that the Superintendent be and he is hereby directed immediately to do the following things in addition to the duties now imposed upon him:

"1. To initiate and organize a program of public relations for the purpose of informing the citizens generally with reference to pressing immediate and future school needs, the program to include the selection of a large central committee to study the details of school needs under the guidance and direction of the Superintendent who will gather information they request such as need of improved support, additional buildings, growth of school population, forecasts of school enrollment, school curriculum offerings, and numerous details of present and proposed school programs; subsequently to issue occasional bulletins containing such detailed and general information which this central committee might authorize and which he will edit; and to cooperate with this committee in calling mass meetings throughout the city and county and to be present personally at these meetings to assist in informing the people generally with reference to the overall specific school situation.

"2. To study the possibility of incorporating within the present school program opportunities for handicapped children such as spastic, deaf, and crippled children, this study to include necessary details such as testing spastic children to determine educability, conferences with State Department officials, investigation as to what other systems are doing, including the basis of their financial support.

"BE IT FURTHER RESOLVED, that for the above new and additional duties imposed upon the Superintendent he shall be paid as additional compensation to the salary now paid him the sum of \$1,000 a year to be paid in equal monthly installments at the same time and in the same manner that his present salary is paid."

"On July 1, 1948, the Board entered into a contract with Dr. C. M. Dannelly, Superintendent, for four years with a specified salary. I would like to ask your opinion if I am authorized under the above resolution to pay Dr. Dannelly the additional compensation therein authorized."

My answer to your inquiry is in the affirmative.

Act No. 222, Local Acts 1939, page 125, consolidates the administration and control of all city and county public school system in Montgomery County, Alabama, under a central board known as the County Board of Education. This act abolishes all other city and county boards of education existing at the time of the passage of this act.

Section 3 of Act No. 222, *supra*, confers very broad rights, privileges, powers and authority on the Board of Education thereby established. In addition to the powers conferred upon said Board of Education by Section 3 of said act, Section 4 thereof reads as follows:

"Section 4. The Board of Education hereby created, shall have full authority to employ all officers, teachers, experts, attorneys, engineers, architects and all other employees of every character which it thinks necessary or desirable for the proper conduct and administration of the business of said Board of Education and to fix their respective salaries and to prescribe their respective duties."

There is no question of the right of the Legislature to confer upon the County Board of Education of Montgomery County the authority vested in it by Section 4 thereof. In the case of *McElderry v. Abercrombie*, 213 Ala. 289, 104 So. 176, the Supreme Court of this State held that:

"It is within the power of the legislature to delegate to administrative agencies, state or divisional, having special knowledge of the nature and quantum of the service, the fixing of the amount of the salary or compensation."

In adopting the resolution, the Board, insofar as it appears, acted within the power and discretion vested in it by Act No. 222, *supra*.

You are, therefore, advised that you, as custodian of the county school funds of Montgomery County, may legally pay Dr. Dannelly the additional compensation as authorized by the resolution adopted on March 10, 1950.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1950.

Hon. Sam Drinkard,
Tax Assessor,
Marengo County,
Linden, Alabama.

Taxation—Exemption—Cemeteries—Ad valorem Taxes.

Property of Cemetery Association exempt from ad valorem taxation even though not presently used as a cemetery, provided there is nothing to show an absence of intent to use the property as a cemetery in the future; the Cemetery Association need not claim an exemption since its property may not be subjected to ad valorem taxation under Section 91, Constitution of 1901.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of March 9, 1950 is as follows:

"Your opinion on the matter hereinafter set out is respectfully requested by the undersigned as Tax Assessor of Marengo County, Alabama.

"In 1910 the Colored Cemetery Association of the City of Demopolis, Alabama, purchased a tract of about 6 acres just South of the city limits of City of Demopolis and within its police jurisdiction; no part of this tract has ever been used as a cemetery or for any purposes connected with a cemetery; the said Cemetery Association, an unincorporated association, has never assessed the property for taxation nor claimed any exemption from taxation. No taxes on said property have been paid since 1910.

"The Colored Cemetery Association of City of Demopolis has no connection, official or otherwise, with the municipal government of the City of Demopolis.

"Your opinion is respectfully requested as to whether or not, under the facts set out above, said real estate is exempt from taxation under Section 91 of the Constitution of Alabama and/or under Section 2 of Title 51 of Code of 1940, and whether such exemption must be claimed at the beginning of each tax year. If it is your opinion that said property is not exempt, or that the exemption must be claimed annually, your opinion is requested as to whether this property should be entered as an escape and sold for five years' unpaid taxes."

Your request involves two matters: first, whether or not the instant property owned by the Cemetery Association is subject to ad valorem

taxation; and second, whether the Association must claim any exemption which it has.

I.

The property in question is not subject to ad valorem taxation on the facts submitted. Although the Association has apparently held the property for a considerable time without putting it to actual cemetery use, there are no facts which indicate that there is an absence of intent to use the property for cemetery purposes in the future. Where there is such a future good faith intent the cemetery property has been held not taxable. Quarterly Report of Attorney General, Vol. 25, page 131. Indeed, *Elmwood Cemetery Company v. Tarrant*, 170 Ala. 459, 54 So. 186, held that the Legislature could not qualify the property tax exemption for cemeteries with a provision that cemeteries held and lots therein sold for profit should not be so exempt. (The facts in the Elmwood Case indicated that the cemetery property was owned by a business corporation which held the property for sale in order to bring pecuniary gain to its shareholders.) See, also: *Hope Cemetery Association v. Rose*, 117 Misc. 457, 191 N. Y. S. 623, 168 A. L. R. 296, and the extensive annotation in 168 A. L. R. 283.

Thus, in the absence of qualifying facts showing no intent to use the property for cemetery purposes, the property involved is deemed held for cemetery purposes and is not subject to ad valorem taxation.

II.

The Association may not be taxed merely because it has failed to claim an exemption. Exemptions granted by the Legislature must be clearly distinguished from so-called "exemptions" which are granted under the Constitution. Section 91, Constitution, states that the property of cemeteries shall not be subject to property taxation. *Elmwood v. Tarrant*, *supra*, held that the Legislature could not qualify this "exemption" by requiring that cemeteries not hold their property and sell their lots for profit. The courts stated:

"Section 91 of the Constitution is plain and unambiguous, exempting from taxation all cemeteries, without qualification, and the Legislature has no authority to attach a qualification to it." (170 Ala. 459, 462.)

Although *Ex parte State In Re State v. Lovejoy*, 188 Ala. 401, 66 So. 1, overruled that portion of the *Elmwood* Case which concerned the share stock tax imposed on the shareholders in cemetery corporations, the above holding the *Elmwood* Case was not disturbed.

Certainly, any requirement by the Legislature that a cemetery must claim an ad valorem tax exemption in order to secure immunity from such taxation would be a qualification on the proviso in Title 51, Section 41, Code of Alabama 1940, that no property omitted from tax rates shall be

exempt does not apply to property which is immune from taxation under the Constitution. Opinions of this office concerning the necessity of claiming certain exemptions are distinguished on this basis also. (See, for example, those opinions concerning homestead exemptions and exemptions for the blind and insane.)

To summarize, the property in question is not subject to ad valorem taxation, and an exemption need not be claimed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1950.

Hon. Norvelle R. Leigh,
Judge of Probate,
Mobile County,
P. O. Box 7,
Mobile 1, Alabama.

Filing Tax—Leases—Taxation.

Even though a lease of certain property has been recorded and a filing tax paid, when a second lease between the same parties and describing the same property, plus additional property not described in the first lease, is offered for record, a filing tax is due on the second lease, and this second tax should be based on the total value of the entire property described in the second lease.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of January 25, 1950, is as follows:

"Your opinion is respectfully solicited in connection with a matter of taxes to be collected by this office for recording a lease contract.

"The facts are, as follows: On the 20th day of November, 1946, there was recorded in this Probate Court a lease covering certain described property lying in the City and County of Mobile, Alabama, for a period of forty years and four months. The instrument that was recorded is known as a 'short form' lease, and by reference refers to another instrument concurrently executed between the parties setting up all of the terms and conditions. The short form lease does not disclose the rental. However, at the time that this instrument

was accepted for recording, the original instrument, or 'long form,' was exhibited to the appropriate recording officer, and the then present value of said lease was calculated to be \$45,138.90. Basing the tax as provided for under Section 618 of Title 51 of the Code of Alabama on this amount, the sum of \$47.00 was collected from the landlord, which included \$1.50 recording fee.

"The parties involved in the transaction evidenced by said recorded instrument subsequently negotiated among themselves for the rental to the tenant of an additional parcel of land slightly enlarging the original parcel. A new 'short form' lease has been offered for recording. This instrument refers to the previous 'short form' lease which was recorded. With the exception of that reference and the fact that it described the parcel involved under the new dimensions (showing the increase in size), it is a duplicate of the original recorded short form lease.

"Again, as in the original instance, the parties seeking to place this of record have fully disclosed the amount of rental to be paid for this additional land. The rental under the original lease, by virtue of the enlargement of the demised premises, is increased at the rate of \$10.00 per month, or \$120.00 per year, or \$4,800.00 for the full term. The present value of this increased rental is \$1,805.55.

"The short form lease now under discussion appears to constitute an extension of the original agreement, which the instant instrument refers to and which was previously subjected to the tax. The question here respectfully propounded is whether or not the amount of tax now to be collected should be calculated on the basis of the present value of that portion of the rental now involved (\$1,805.55), or whether it should be the present value of the combined rental covered under the new agreement and the original lease (\$1,805.55) plus \$45,138.90)?

"Your are respectfully referred to the Attorney General's opinion, April-June, 1940, page 181."

The amount of tax due should be calculated on the basis of the present total value of the new lease agreement and the original lease agreement, as evidenced by the total rental of \$46,944.45, assuming that rental indicates value here.

Title 51, Section 618, Code of Alabama 1940, provides that a filing tax is to be paid on the recordation of any instrument which conveys an interest in real property. Since a lease of real property conveys an interest in the same, a filing tax on the recordation of the lease is collectible. Biennial Report of Attorney General, 1928-30, page 987. Such described in the lease which is offered for record.

A mortgage given to secure a debt already secured by a prior mortgage, as well as a new presently incurred debt, is subject only to a

mortgage filing tax measured by the amount of the new debt, provided the filing tax was paid on the recordation of the prior mortgage, and provided the amount and maturity date of the original debt remain unchanged. Quarterly Report of Attorney General, Vol. 23, page 214. However, this opinion dealt solely with mortgages under Title 51, Section 619(d), *supra*.

Sections 618 and 619, *supra*, are different in scope and content. The former concerns filing taxes on recordation of deeds, etc; the latter concerns mortgages, etc. Nowhere in Section 618, *supra*, is there any exemption where a prior deed filing tax has been paid on the recordation of an instrument conveying the same property. But compare Section 619(d), *supra*, where mortgages are concerned. And compare further the exemptions actually set out in Section 618, *supra*, for transfers of mortgages of property upon which a mortgage filing tax has been paid, or for deeds executed for a nominal consideration for the purpose of perfecting title. If A obtains a lease on Blackacre and pays a filing tax to record it, when A assigns his lease of Blackacre to B, another filing tax must be paid for the privilege of recording this second lease. This would not be the case if a mortgage instead of a lease were involved. Therefore, if the Legislature had intended that the filing of each transfer of a deed or lease should not be subject to a tax, it would have so specified, as it did specify for mortgages.

The entire rental for the entire property covered by the second lease should be considered in determining the filing tax due on the recordation of this lease.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1950.

Hon. G. C. Brittain,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Primaries — Elections — County Democratic Executive Committee.

Names of unopposed candidates for County Democratic Executive Committee shall not appear on the ballot in the primary election, under Act No. 601, General Acts 1947, page 444.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of March 8, 1950 is as follows:

"Your kindness in rendering an opinion in the following circumstances will be appreciated.

"Act No. 601, approved October 9, 1947, which relates to the certification of names of candidates for party nomination contains the provisions:

"If a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, his name shall not be printed on the ballots to be used in the primary election, and he shall be the nominee of the party with which he has qualified for the office."

"I particularly wish to request your interpretation of this provision as related to candidates for the County Democratic Executive Committee. In this county a number of candidates for this office are unopposed. Should their names be printed on the ballots to be used in the primary election to be held on May 2nd?

"There is some thought that since the May 2nd primary is a final election, so far as the party office of Member of the County Democratic Executive Committee is concerned, that the names of the candidates, although unopposed, should be printed on the ballot."

Act No. 601, General Acts 1947, page 444, amended Title 17, Section 344, Code of Alabama 1940, principally by adding thereto the portion of the Act which you have quoted in your request.

It is significant in answering your inquiry to note (1) that this Act applies solely to primary elections, and (2) that party officers are elected in the primary elections.

The provisions of this Act relate to all the candidates in the primary election. No exception of candidates for party officers is made, nor is it apparent that the Act intended to make such exception.

This Act was interpreted in part in an opinion found in Quarterly Reports of the Attorney General, Vol. 50, page 188.

I am of the opinion, therefore, that the names of unopposed candidates for the County Democratic Executive Committee should not, by virtue of Act No. 601, supra, be printed on the ballots to be used in the primary election, such unopposed candidates becoming, by operation of law, duly elected party officers.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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